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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., et al.,
and
LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that writ of certiorari issue to review the judgments of the United States Court of Appeals entered in the above cause on August 31, 1962, reversing the judgments of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, filed July 3, 1961 (R. 373) is officially reported in 197 F. Supp. 230. The opinion of the Court of Appeals for the Fifth Circuit (R. 732; App. A, pp. 1a-13a) is reported in 307 F.2d 802.

JURISDICTION

The matter in controversy exceeds $10,000.00 in the case of each petitioner, arose under a treaty of the United States, and was between a citizen of a State and subjects of foreign states. Jurisdiction of the United States District Court for the Southern District of Florida was based on 28 U.S.C. §§ 1331 and 1332 (R. 151). The judgments of the Court of Appeals for the Fifth Circuit here sought to be reviewed were dated and entered on August 31, 1962 (R. 746, 747; App. B, pp. 14a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Are 20-year lease agreements between United States international airlines and the Miami airport authority, which agreements provide for airport charges to such lessee airlines, "inconsistent obligations" within the ambit of Article 82 of the Chicago Convention, so as to make ineffective Article 15 of that Convention requiring that airport charges to petitioners' foreign-registered aircraft engaged in international air services shall "not be higher" than the airport charges for United States aircraft engaged in similar international air services?

2. Under Article 15 of the Chicago Convention, is the right of petitioners' foreign-registered aircraft in

international service, to use of the Miami airport at charges not higher than those exacted of competing United States airlines for the similar use of the airport by aircraft carrying 67% of all international traffic, nullified or avoided by the mere fact that one small United States airline, flying to only six Latin-American countries and carrying only 2% of the international traffic at such airport, has been paying landing charges not less than those paid by petitioners' foreign-registered aircraft?

3. Does the valuable consideration exception to the most-favored-nation clause as interpreted and applied by this Court in 1887 and 1888 apply to nullify rights under a multilateral aviation treaty executed in 1944, effective in 1947, where the treaty contains no "most-favored-nation" clause but provides that airport charges to foreign aircraft shall "not be higher" than "those that would be paid by its [United States] national aircraft"?

4. Independently of the Chicago Convention, do the respective bilateral Air Transport Services Agreements of the United States with the seven Latin-American States of which seven of the foreign airline petitioners here are nationals, confer upon the petitioners a presently enforceable right to airport charges not higher than those imposed on United States national aircraft used by the principal competing United States airlines engaged in similar international air services?

TREATIES AND EXECUTIVE AGREEMENTS INVOLVED

The Convention with Other Governments Respecting Civil Aviation, December 7, 1944, Arts. 15 and 82, 61 Stat. 1180, 1184, 1203, T.I.A.S. 1591 (effective April 4, 1947) (commonly known as the Chicago Convention) provides:

"Article 15

"Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68 be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

"Any charges that may be imposed or permitted to be imposed by a contracting State for use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

"(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

"(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

* * * * * * * * *

"Article 82

"The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting

State which, before becoming a member of the Organization has undertaken any obligation toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention."

Executive Agreements (Air Transport Services Agreements) with:

Brazil, September 6, 1946, Article III(1), 61 Stat. (4) 4121, 4126, T.I.A.S. 1960 (effective October 6, 1946).

Colombia, October 24, 1956, Art. 7(a), effective provisionally January 1, 1957 (State Dep't Press Release, October 25, 1956).

Ecuador, January 8, 1947, Art. 3(a), 61 Stat. (3) 2773, 2774, T.I.A.S. 1606 (effective April 24, 1947).

Mexico, March 7, 1957, Art. VII(a) [1957] 8 U.S.T. & O.I.A. 295, 310, T.I.A.S. 3776 (effective June 5, 1957); August 15, 1960, Art. 7(a) [1961] 12 U.S.T. & O.I.A. 60, 65, T.I.A.S. 4675 (effective provisionally August 15, 1960, definitively January 17, 1961).

Panama, March 31, 1949, Art. III(a), 63 Stat. (3) 2450, 2452, T.I.A.S. 1932 (effective April 14, 1949).

Peru, December 27, 1946, Art. 3(a), 61 Stat. (3) 2586, 2587, T.I.A.S. 1587 (effective December 27, 1946).

Venezuela, August 14, 1953, Art. 4(a), [1953] 4 U.S.T. & O.I.A. 1493, 1498, T.I.A.S. 2813 (effective August 22, 1953).

All are substantially identical with the following Art. 3(a) of the Executive Agreement with Ecuador (*supra*):

> "In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:
>
> (a) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services."

STATEMENT

This case involves the legality under treaty and executive agreements of airport charges imposed upon foreign air lines for use of the Miami International Airport, the second largest international airport in the United States in terms of international traffic.

Plaintiffs, petitioners here, are ten foreign airline corporations of ten Latin American countries,[1] all engaged in international air services between Miami, Florida, and points in their own countries and elsewhere. The defendant Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority, is the owner of Miami International Airport.

The original complaint by petitioners and others was filed December 19, 1958, in the United States District Court for the Southern District of Florida.

In pertinent substance petitioners' fifth amended complaint, filed October 21, 1960 (R. 148, 152-156) alleged that their cause of action arose under:

(a) Article 15 of the Convention with Other Governments Respecting International Civil Aviation, commonly known as the Chicago Convention, and providing in section 15 as quoted above, p. 4;

(b) As to seven petitioners, Air Transport Services Agreements between the United States and their respective governments in which in substantially identi-

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[1] 1. Aerovias Interamericanas de Panama, S.A. (APA) of Panama.
2. Aerolineas Peruanas, S.A. (APSA) of Peru.
3. Compania Ecuatoriana de Aviacion, S.A. (CEA) of Ecuador.
4. Empresa Guatemalteca de Aviacion, S.A. (Aviateca) of Guatemala.
5. Empresa de Transportes Aerovias Brasil, S.A. (REAL) of Brazil.
6. Guest of Aerovias Mexico, S.A. (Guest) of Mexico.
7. Lloyd Aereo Colombiano, (Lloyd) of Colombia.
8. Rutas Aereas Nacionales, S.A. (RANSA) of Venezuela.
9. Transportes Aereos Nacionales, S.A. (TAN) of Honduras.
10. Lineas Aereas de Nicaragua, S.A. (LANICA) of Nicaragua.

cal language (e.g. the Brazilian agreement) it is provided that:

> "The charges which either of the contracting parties impose or permits to be imposed on the airline or airlines designated by the other contracting party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services."[2]

The complaint further alleged and the trial court found that the respondent Port Authority operates the Miami International Airport as a public airport open to "public use" within the meaning of Article 15 of the Chicago Convention (R. 154, 394); that the Port Authority collects charges and operational fees from various users of the airport, including plaintiffs and plaintiffs' suppliers and the amounts thereof are imposed and levied in part pursuant to Resolution No. 56 of the Port Authority adopted in September 1946 and amended in February 1960 (R. 154, 398). The complaint further alleged and the Trial Court found that the various charges and operational fees, including indirect charges under concession contracts of suppliers of gasoline, oil, fuel and food, required by the Port Authority to be paid by the plaintiffs for the use of the facilities of the airport are substantially higher than those exacted from the so-called Big Four airlines

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[2] Art. III (1) Agreement with Brazil 61 Stat. 4121, 4126; TIAS 1900 (effective October 6, 1946).

This article was adopted from, and is substantially identical with Article 4(a) of the Form of Standard agreement incorporated in the Final Act of the International Civil Aviation Conference signed at Chicago on December 7, 1944; (*Proceedings of the International Civil Aviation Conference* (1944), p. 128 (Dept. of State Publication 2820)).

that make substantially identical use of the same public airport—Pan American World Airways, Eastern Airlines, Inc., Delta Air Lines, Inc., and National Airlines, Inc.—and substantially higher than those that would be paid by Pan American and National, the two of the four that operated United States national aircraft in international airline services similar to those in which all plaintiffs engage (R. 154-155, 398, 399).

The complaint alleged (R. 157-158) and the Trial Court found (R. 398) that the plaintiffs pay five types of airport charges, four of which are not imposed upon the Big Four at all, viz.:

First: $.50 passenger terminal charge

Second: $2.00 per ton cargo terminal charge

Third: 5% indirect surcharge on all aviation gasoline and oil

Fourth: 5% indirect surcharge on all meals to be served aloft, and purchased at the airport.

and that the fifth type of charge, the landing charge, paid by plaintiffs for uses of the airport was substantially higher than the landing charges which are paid or would be paid by Pan American (hereinafter called Pan Am) and by National for the same uses (R. 398-399).

The complaint alleged (R. 154), and the trial court found, that all plaintiffs are engaged in "similar international air services" to those of Pan Am and National (R. 395).

The complaint further alleged (R. 155-156) and the trial court found (R. 393-394) that such higher charges

to plaintiff-petitioners violate (a) Article 15 of the Chicago Convention (supra, p. 4); and (b) the similar articles of the Air Transport Services Agreements cited above, applicable to seven of the petitioner airlines.

The amended complaint sought (R. 160) and the trial court issued (R. 437) an injunction against the collection of all such higher and extra charges for use of the airport.

The amended complaint had prayed that the injunction enjoin the collection of any higher landing charges than the *average* charge per landing that would be paid by Pan Am and National for their aircraft engaged in similar international operations (R. 161). The injunction of the trial court did not contain this requested provision but provided—

> "The defendant is entitled, however, to charge these plaintiffs on a scheduled flight basis rather than on an actual flight basis under the identical provisions which are applied to Pan Am and National as stated in the landing charges section of their lease agreements. (R. 439, 440)

The amended complaint also sought (R. 158-160) refunds to each of the petitioners of so much of the amounts of airport charges paid by them within four years prior to the date of the original complaint as exceeded the amounts which they would have paid under the Big Four scale of charges. The trial court, as an incident to the injunctive relief, awarded money judgments for such claimed refunds, as shown by proof

of record, except as to the amounts claimed for the 5% meal charges (R. 428, 429).

As of the date of the trial there were 12 foreign airline plaintiffs in the consolidated case. A thirteenth plaintiff, Lineas Aereas Nicaragua, S.A. (LANICA) had been dismissed for procedural reasons (R. 383). LANICA filed a new separate suit (R. 488); its case was decided similarly by the trial court (R. 537, 549) and was consolidated with the others in the Court of Appeals (R. 691).[3] The trial court withheld any relief for three Cuban airline plaintiffs but retained jurisdiction as to them (R. 425). Hence the ten petitioners were the only foreign airlines before the Court of Appeals.

The defenses of the respondent involve in part the history of the development of the airport. The facts are stated substantially correctly by the opinions of the District Court (R. 376 et seq.) and the Court of Appeals (R. 735-738; App. A, pp. 3a-6a).

The original airport, a fraction of its present size, was owned by Pan American World Airways, Inc. Other adjoining tracts, improved by various airport facilities were owned by the United States Government and included the adjacent property known as the "Convair property" (App., p. 3a).

In the latter part of 1945 the Pan Am airport, consisting of 223 acres was transferred to Dade County, Florida, in exchange for delivery to Pan Am of $2,500,000 revenue bonds issued by Dade County, payable

[3] The plaintiff APSA, the Peruvian airline, was awarded an injunction but no refund because it commenced services into Miami only 2½ months prior to the trial, which was after the date covered by the proofs of record on refunds.

solely from the revenues of the airport. At about the same time in a three-way transaction between Eastern, Defense Plant Corporation of the United States and the newly created Dade County Port Authority (respondent herein), the so-called Convair property was acquired by the Port Authority (App., p. 4a). Eastern supplied the purchase price of $700,000 paid to the government, the Port Authority took title and leased the property to Eastern for a long period of years for Eastern's exclusive use. Eastern's rentals under that lease were to be credited against the $700,000 which was considered pre-paid rent.[4] Pan Am leased back from the Port Authority buildings for its exclusive use which it had just transferred to the Port Authority. The County acting as Dade County Port Authority took over the operation of the airport on January 1, 1946. (R. 377)

Through divers gifts from the United States government and through some additional purchases of large tracts made with funds provided by the United States government, the original size of the airport increased considerably through the years (R. 377).

On December 11, 1945 the respondent entered into a lease agreement for a term of 20 years commencing January 1, 1946 with Pan Am for the rental of certain property and facilities of the airport.[5] Effective the same date, the respondent executed three other lease agreements identical in form with the Pan Am lease.

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[4] Stipulated Exhibit 18, pp. 16-17, [unless otherwise indicated references to exhibits are to unprinted original exhibits].

[5] Stipulated Exhibit 2, parts printed at R. 632-647.

with the following: Eastern Airlines, Inc., National Airlines, Inc., and Delta Airlines, Inc. (R. 377). At the time of the execution of these leases with the Big Four Pan Am was the only United States airline rendering international air services from Miami (R. 377). National, another member of the Big Four, began flying internationally in 1947 between Miami and Havana, Cuba (R. 377). Because of the Cuban situation, National early suspended service to Havana (R. 395); and very recently Pan Am also suspended such service. The District Court found (R. 377-378):

> "On February 27, 1946, a fifth lease agreement, substantially identical in form with the Big Four leases was entered into between the defendant and Taca Airways Agency, Inc., a service company for TACA, S.A., a foreign air carrier, domiciled in the Republic of El Salvador. Taca used the airport in its international operation until about February 1948, when it ceased permanently to operate its aircraft to Miami. Its lease was shortly thereafter terminated by mutual agreement of the parties."

While it is possible that similar lease arrangements were offered to other airlines at that time, which airlines did not accept them, there is, other than mere assertion, no substantial evidence of record so showing. Certainly there is no contention or evidence that any of the ten foreign airline petitioners were ever accorded the opportunity of entering into such lease agreements. Of course, all of the petitioners began to fly to Miami at much later dates, the first to arrive being the Brazilian airline petitioner, known as REAL, late in 1948.[6]

[6] Stipulated Exhibit 26.

The rental commitments of the five airlines in 1946 were as follows (Stipulated Exh. 3):

Name of Airline	*Total Monthly Rent*
Pan Am	$11,434.58
Eastern	1,097.75
National	85.63
Delta	493.36
TACA	1,380.55

The District Court found that these rentals are not higher per square foot for the same type of space than rentals paid by the plaintiffs (R. 396,397). While the Big Four have since increased their rental areas substantially and consequently pay considerably more rent now than they did in 1946, some of the foreign airlines, none of whom were there in 1946 nor even in 1947,[7] today pay substantial rentals (Stipulated Exh. 4, pp. 4-6):

Abbreviated Name of Petitioner	*Total Monthly Rent*
REAL (Brazil)	$ 956.09
Guest (Mexico)	835.88
RANSA (Venezuela)	2,644.66
TAN (Honduras)	1,631.73

It was not until 1955 that the third United States international airline, Braniff International Airways, began international air services out of Miami (R. 378). Braniff is comparatively small in the international field carrying only 2% of the Miami international traffic, whereas Pan Am carries 64% and National 3%. Braniff serves only 6 countries in Latin America (five being

[7] Date when each petitioner began service to Miami International Airport set forth in Stipulated Exhibit 26.

the homelands of five petitioners). Pan Am serves all countries of Latin America (R. 305).

On October 1, 1946 the Port Authority promulgated its Resolution No. 56 establishing the schedule of charges for all airlines other than the Big Four (R. 652-654). It is the substantially higher charges provided therein, and other related charges from which the Big Four are exempt, against which petitioners complain. These impose upon petitioners an average charge per aircraft landing 180% higher than that for the Big Four (App., p. 27a). While the Court of Appeals refers to these charges as the Port Authority's "usual schedule of charges for landing and other aviation fees" (App. A, p. 1a) it should be noted that such charges apply only to 25% of the total (domestic and international) aircraft landings. This is because the preferred Big Four airlines make 75% of the total landings and do 67% of the international business.[9]

As pointed out by the Court of Appeals (App. A, p. 6a) the two sets of airport charges have been a matter of dissatisfaction for many years. The complaints mentioned by the Court of Appeals were not however lawsuits but merely protests to the Port Authority itself requesting equality of rates.[10] The only litigation prior to this was the Northeast Airlines suit in the Florida courts in which the complaint of Northeast, a domestic U.S. airline against higher airport charges under the Federal Airport Act was sustained,[11] and the case later settled.

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[8] App., p. 20a-21a. Stipulated Exhibit 13 showing schedules of various airlines.

[9] Stipulated Exhibit 23; Plaintiffs' Exhibit 31 (attached Exh. A); App., p. 27a.

[10] Stipulated Exhibit 19.

[11] Northeast Airlines v. Walter Weiss, 113 So. 2d 884 (Fla. Dist. Ct. App. 1959) cert. denied, 116 So. 2d 772 (Fla.).

The Answer of the respondent to the fifth amended complaint (R. 164) was regarded by the trial court as raising the following defenses (R. 386):

That Resolution 56 does not violate Article 15 of the Chicago Convention or the corresponding provisions of the various Bilateral Service Agreements; that the Treaty in any event is not self-executing; failure of plaintiffs to exhaust administrative or diplomatic remedies; lack of equity; laches and statute of limitations; equitable estoppel and estoppel to recover monies voluntarily paid (R. 386).

Opinion of Trial Court.—After trial held December 6 and 7, 1960, the District Court on July 3, 1961 filed its memorandum opinion dated June 30, 1961 (R. 373). The Court after making the findings of fact above mentioned, carefully analyzing the evidence and reviewing the law, held that the enforcement of Resolution No. 56 and other extra charges of the respondent imposed upon the petitioners was a direct and unequivocal violation of Article 15 of the Chicago Convention. (R. 393-394).

The District Court found that because of the scale of charges fixed in the Big Four lease agreements (R. 632-634) the petitioners' charges aforementioned were substantially higher than those paid or payable by the Big Four for the same uses of the airport (R. 398-399).

The aircraft of all plaintiffs below, except those of one plaintiff, were registered in countries which were at all times here involved contracting States to the Chicago Convention. The one exception was the aircraft of APA of the Republic of Panama which did not ratify the treaty until 1960. However, the District Court

observed that Panama had a Bilateral Air Transport Services Agreement with the United States, effective April 14, 1949, 63 Stat. 2450, which in Article 3(a) thereof incorporates the form agreement [12] adopted by the Final Act of the Chicago Convention prohibiting the imposition on foreign aircraft of airport charges higher than those imposed upon national aircraft. The District Court held that this Executive Agreement had equal dignity with a treaty requiring the same relief for APA as for the other foreign airline plaintiffs (R. 390).

The opinion also held that the other Bilateral Air Transport Service Agreements, executed by the United States and the nations of domicile of all the plaintiffs except TAN of Honduras and Aviateca of Guatemala,[13] although not individually ratified by the Senate, have the same status as formal treaties in every respect, and that all conclusions with respect to the Chicago Convention shall be considered equally applicable to the corresponding provisions of the said Service Agreements (R. 390-391).

The Court rejected the defendant's attempt to justify the preferential treatment of Pan Am and National, the two United States international operators (R. 399-400);

1. The contingent liability assumed by each of the Big Four, under their 1945 leases to pay possible operational deficits: (a) terminated on July 1, 1947 and was formally eliminated from the leases by amendment on

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[12] See page 8, supra, n. 2.

[13] Nicaragua, the homeland of LANICA, the consolidated petitioner, was party to no bilateral agreement with the United States.

August 8, 1950 (R. 399); (b) was meaningless even while in force because, while para. 5(d) of Article II provided for increase in charges to the Big Four [14] if there was a deficit in operation of the airport, profits over and above a specified working capital fund were required to be paid to the Big Four (R. 400).

2. Defendant's contention that as large tenants with large rental commitments, the Big Four were entitled to special consideration, has no merit because National, under the first year of its lease paid only $85.93 per month, whereas RANSA, one of the plaintiffs, now pays $2,644.76. In any event, the treaty test is not "reasonableness" nor "discrimination." The prescribed requirement is that the charges "shall be no higher than" (R. 400).

The Court also rejected (R. 401) the contention that the treaty requirements were satisfied because Braniff, a relatively small United States airline in international flight service, pays charges on the same basis as plaintiffs (citing *Bacardi Corporation of America* v. *Domenech*, 311 U.S. 150, 165).

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[14] The lease agreements imposed a burden more apparent than real since each provided (Art. II, para. 5, subpara. (d)) (App., p. 19a):

> "The Lessee *and all other air transportation companies operating on the airport* shall within thirty days after written demand therefor, pay a special assessment sufficient to make up said deficit, which assessment shall be apportioned among said companies ratably in accordance with the number of flights scheduled to land at the Airport during the fiscal year in which such deficit occurred, as shown by schedules filed with the Civil Aeronautics Board." (Emphasis supplied)

Thus, the Big Four alone were given an equity participating interest in the profits of any year but assumed only to pay a portion of the losses, proportionate to the ratio of scheduled flights of each to scheduled flights of *all carriers* during the deficit year.

The Court, citing copiously, rejected the contention that the Treaty was not self-executing (R. 402-411) and on ample authority rejected defendant's other defenses: failure to exhaust treaty grievance procedures (R. 411-416); laches (R. 417-418); equitable estoppel (R. 418); voluntary payments (R. 419-422); statute of limitations (R. 423-424).

Final decree was entered October 4, 1961 (R. 437) and order denying defendant's motion for new trial was entered November 9, 1961 (R. 461).

The defendant noted its appeal (R. 470) and plaintiffs noted their cross-appeal with respect to minor points (R. 478-479).

Court of Appeals decision.—The two appeals were consolidated on appeal (R. 691). The opinion of the Court of Appeals refers to the memorandum opinion of the District Court in 197 F. Supp. 230 for a detailed statement of the facts (R. 733; App., p. 2a) but restates in some detail certain of the terms of the 20-year lease agreements with the Big Four (R. 736; App., pp. 4a-5a). The Court of Appeals reversed the trial court on the following grounds:

1. As a first ground, the Court held that, within the meaning of Article 82 of the Convention (presumably relying on the last sentence of that Article) the Big Four agreements are obligations "inconsistent" with the provisions of Article 15; that hence Article 15, requiring that charges to plaintiffs' foreign aircraft "not be higher" than charges to the Big Four national aircraft was not effective (apparently meaning "self-executing") immediately because the United States, by Article 82 merely undertook in the future to secure the

termination of such "inconsistent" obligations (R. 742-743; App., pp. 10a-11a).

2. As a second ground, the opinion appears to hold that the requirements of Article 15 are satisfied by a showing that Braniff, a relatively small American airline flying internationally into six Latin American countries since 1955, had been subjected to the same airport charges at Miami as were the petitioners (App., p. 10a).

3. As a third ground, the Court held that private rights asserted by petitioners "include benefits from most favored nation clauses" (App., p. 8a); it then held that under *Bartram* v. *Robertson*, 122 U.S. 116 (1887) and other cases decided by this Court in 1888, the "most-favored-nation" clause when used in treaties of the United States was construed to include a "condition" either express or implied, that favors which either party to the treaty grants to a third country, shall not accrue to the other party to the treaty claiming "most-favored-nation" rights if the favor to the third country was granted for a valuable consideration. It concluded that, because the Big Four had furnished valuable consideration for their lease agreements, petitioners cannot complain of the preferential airport charges (App., p. 13a).

As to the bilateral agreements upon which seven of the petitioners relied, and which the trial court held clearly sustained their claimed right to equal treatment independently of the Chicago Convention (R. 390-391) the opinion was silent. Nevertheless, the Court of Appeals entered its judgments reversing the decrees of the trial court (R. 746, 747; App. B, pp. 14a-17a).

REASONS FOR GRANTING THE WRIT

The adjudication of rights claimed under a treaty of the United States is always a grave and solemn duty of the Federal judiciary. The honor of the Government of the United States and of its people is involved (*Chew Heong* v. *United States*, 112 U.S. 536, 540; *Head Money Cases*, 112 U.S. 580, 598) and the careful observation of the requirements of treaties with meticulous regard to the duty of good faith is enforced as an essential to the promotion of amity among the peoples of independent nations party thereto which is the main object of any treaty. *Sullivan* v. *Kidd*, 254 U.S. 433, 439; *Tucker* v. *Alexandroff*, 183 U.S. 424, 437.

The Chicago Convention Respecting Civil Aviation codifies most of the public international air law of the world to which air carriers are subject and practically every nation of the world except the U.S.S.R. is a signatory thereto. Beaumont, Legal Position of Air Carriers, 3 Int'l Law Quarterly (1950), pp. 360, 362.

Where, as here, a federal court is called upon to construe and apply a multi-lateral treaty to which such a large part of the world subscribes, it is impossible to over-emphasize the importance of rigid adherence to the basic rules of treaty interpretation repeatedly enunciated by this Court with full regard for the grave responsibility involved.

1. The Court Below Has So Far Departed From the Ordinary Course of Judicial Proceedings and Has So Far Disregarded the Decisions of This Court As To Require Exercise of the Supervisory Powers of This Court.

Recognizing the considerations peculiar to the construction and enforcement of international obligations, this Court has, by application and unswerving reiteration, established basic rules of construction of treaties:

(a) Treaties are to be interpreted according to the natural, fair and received acceptation of the terms in which they are expressed. *Ware* v. *Hylton*, 3 Dall. 199, 239-240; *United States* v. *D'Auterive*, 10 How. 609, 623; *Geofroy* v. *Riggs*, 133 U.S. 258, 271; *Santovincenzo* v. *Egan*, 284 U.S. 30, 40.

(b) Treaties are to be construed, not grudgingly, or in a niggardly fashion, but in a broad and liberal spirit, and if the language fairly admits of two interpretations, one restrictive of private rights claimed thereunder, the other liberal and furthering private rights, the more liberal construction is to be adopted to carry out the apparent intention of the parties and to secure equality and reciprocity between them. *Geofroy* v. *Riggs*, 133 U.S. 258, 272; *Jordan* v. *Tashiro*, 278 U.S. 123, 128-129; *Tucker* v. *Alexandroff*, 183 U.S. 424, 437; *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294; *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163.

(c) The meaning given treaties by the departments of government particularly charged with their negotiation and enforcement are given great weight. *Charlton* v. *Kelly*, 229 U.S. 447, 468; *Sullivan* v. *Kidd*, 254 U.S. 433, 442; *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295; *Kolovrat* v. *Oregon*, 336 U.S. 187, 194.

This Court has always indicated scrupulous care to see that these principles are observed by all the lower courts.

A. The Court Below Has Disregarded All Principles of Treaty Interpretation in Holding that Lease Agreements of the Defendant Are "Inconsistent" With the Terms of the Chicago Convention.

The particular portion of Article 15 of the Chicago Convention, upon which petitioners particularly rely, provides (61 Stat. 1184):

> "Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,
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> * * * * * * * *
>
> (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

The court below, as its first ground for reversing the trial court, holds that the Big Four lease agreements fixing landing charges, inter alia, for aircraft of Pan Am and National are obligations *inconsistent* with the Chicago Convention within the meaning of "inconsistent obligations" as that term is used in Article 82 of the Convention; that hence Article 15 cannot be self-executing insofar as it requires that landing charges for aircraft of other nations "shall not be higher" than those paid by United States national aircraft (App., p. 11a).

(1) The decision violates the plain and accepted meaning of words used in both the English and Spanish texts.

In so holding the decision below disregards the plain and established meaning of a word common in the English language and makes a mockery of the conscientious attempt at international understanding.

Here the mandate of the Treaty was simple and clear. The plain purpose and effect of Article 15 of the treaty was to provide that the rates charged the aircraft of petitioners, subjects of Latin American states, should be made to accord with, or at least "not be higher * * * than" the rates charged United States national aircraft (such as Pan Am) engaged in such international air services. The lease agreements of each of the Big Four, including Pan American, with the defendant did not state in terms that they should be exclusive or that the rights to the landing charges specified therein should be exclusive. On the contrary the terms of the lease agreements indicate anticipation on the part of both parties to each agreement that the defendant would enter into similar lease agreements with other air transport companies (App. C, p. 19a). The only specific protection afforded Pan American or the others of the Big Four was that if better terms should be given to any other or subsequent lessee, the same benefits should accrue to each of them (App., p. 19a).

If both the lease agreements and the Convention are given full effect, they are in no way repugnant; rather the treaty merely provides for the removal of any discrepancy in charges for similar airport uses as between foreign aircraft and national aircraft engaged in similar international services. Thus the terms of the treaty are addressed to attaining perfect accord with the Big Four contracts.

Yet the appellate court holds the Big Four contracts "inconsistent" [13] with the treaty provisions. This basic

[13] "When I use a word," Humpty Dumpty said, "it means just what I choose it to mean—neither more nor less." Charles L. Dodgson (Lewis Carroll) Through the Looking Glass, c. 5.

premise of decision is such a shocking perversion of language as to lend added significance to the lower court's failure even to attempt to show how the lease agreements are "inconsistent" with the Convention.

In pertinent part Webster's Unabridged Dictionary (2d ed.) defines "inconsistent" as follows:

> "1. Not consistent; incompatible, incongruous, inharmonious; specif., of propositions, ideas, beliefs, etc., so related that both (or all) cannot be true or containing parts so related; as *inconsistent* statements; also, so related to something premised or understood that it cannot be true if what is thus assumed is true; as an *inconsistent* conclusion. * * *
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> . . . . . .
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> "5. Without material consistency or coherence of parts.
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> "Syn.—Contradictory, discordant, dissonant, incoherent, discrepant.—INCONSISTENT, INCONGRUOUS, INCOMPATIBLE. INCONSISTENT implies contradiction or discrepancy; INCONGRUOUS, lack of harmony, or reciprocal unsuitability, often verging on absurdity; INCOMPATIBLE suggests positive opposition or contrariety, as of objects or qualities which cannot coexist."

The Spanish and French texts of the Convention, each of which are of equal authenticity with the English text (61 Stat. 1207) both use the word "incompatibles" for "inconsistent" throughout Article 82. "Incompatibles" in all standard French-English and Spanish-English dictionaries translates as the same word in English.

(2) The decision overlooks legislative history showing that Article 82 relates only to agreements of airlines with other States or nationals of other States.

The Court of Appeals apparently relied upon the third sentence of Article 82 for its theory of inconsistency of the Big Four contracts. Legislative history reveals that in the latest draft of the third sentence of Article 82 the description of the contemplated obligation on the day prior to final adoption read, as it had through numerous drafts, as follows (Doc. No. 454, Proceedings of the International Civil Aviation Conference (1944) Dept. of State Pub'l'n 2820, pp. 616, 639):

> "If an airline of any contracting State has entered into such obligations *with any non-contracting State or with any airline of a non-contracting State*, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention." (Emphasis supplied)

The change to the final form by Doc. No. 467 (Proceedings, pp. 642, 645) deleted the words "with any non-contracting State or with any airline of a non-contracting State", and inserted before the word "obligations" the words "any such inconsistent". That no change of meaning was intended is shown by the fact that the change was adopted without comment in the report of its committee meeting (Proceedings, p. 654) plus the official Commentary on the Convention, stating that the final language of Article 82 was merely a "slightly condensed version" of that Article as carried in prior drafts (Proceedings, pp. 1393-1394).

There is nothing in the legislative history of Article 82 indicating that it was ever intended to cover ar-

rangements or obligations between nationals of the same State. Hence, even if the Big Four contracts could, by any stretch of the imagination, be considered "inconsistent" with the Convention they were not intended to be covered by Article 82 of the Convention. Municipal law was to take care of such matters.

This is confirmed by the statement in Bin Cheng, Law of International Air Transport (1962), p. 141:

> "Moreover, under Article 82, if an airline of any contracting State has entered into agreements or understandings with a foreign State, or a foreign airline which are inconsistent with the terms of the Chicago Convention, 1944, the contracting State of which the airline is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this convention."

(3) Article 15 of the Chicago Convention is self-executing and is in full force and effect.

The Court of Appeals acknowledged that the Convention was, in general, effective immediately, but held that Article 15 was not fully effective (App. A, pp. 10a, 11a), in other words that Article 15 was not self-executing.

It is nothing new in United States international aviation policy to provide equality of airport charges between national and foreign aircraft. Legislative history of the Chicago Convention substantiates this (App. pp. 31a-40a). The United States much earlier fully subscribed to the same principle in the Habana

Convention of 1928 [16] and at least one prior Executive Agreement executed in 1935.[17] Because the Habana Convention was in full force and effect before, and at the time of, the negotiations of the Big Four lease agreements and the passage of Resolution 56, it is immaterial that the Big Four lease agreements were executed prior to the effective date of the Chicago Convention (Cf. Court of Appeals op., App. p. 10a, n. 4).

The Department of State has always considered Article 15 of the Chicago Convention to be self-executing (App. p. 41a). The Civil Aeronautics Board considers the Convention to be in full force and effect (App. p. 23a).

Mr. Paul T. David, Alternative United States Representative to the International Civil Aviation Organization, in an address to the Airport Operators Council (of which Miami International Airport was a member)

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[16] Habana Convention, February 20, 1928, Art. XXIV, 47 Stat. (2) 1901, 1907 T. S. No. 840, (effective as to the United States August 26, 1931) provided:

> "The aircraft of one contracting state engaged in international commerce with another contracting state shall not be compelled to pay other or higher charges in airports or air dromes open to the public than would be paid by national aircraft of the state visited, likewise engaged in international commerce."

In addition to the United States, Cuba, Ecuador, Guatemala, Honduras, Nicaragua, Mexico, and Panama were parties thereto. The United States and its citizens were bound by this treaty until after the effective date of the Chicago Convention and until November 29, 1947, the effective date of its denunciation pursuant to Article 80 of the Chicago Convention (61 Stat. 1180, 1203).

[17] Air Navigation Arrangement with Great Britain, April 5, 1935, Art. 7, 49 Stat. (2) 3720 (effective May 5, 1935). (App. p. 33a)

on April 1, 1948, treated Article 15 of the Chicago Convention as fully effective, stating:

> "The Convention was ratified by the United States with the advice and consent of the Senate. Accordingly, *the provisions of the Convention are now the law of the United States* . . .
>
> ". . . On the important matter of landing charges it is provided *that a foreign aircraft operator shall not be required to pay higher charges than a national operator engaged in the same kind of services.* . . ." (David, ICAO Activities Affecting the United States Airports, Papers Presented at The First Annual Meeting of the Airport Operators Council, pp. 42-45) (Emphasis supplied)

Department of State publication entitled "Aspects of United States Participation in International Civil Aviation" (1948) (State Department Publication 3209) at page 39 treats Article 15 as fully effective, saying:

> "Article 15 of the Chicago Convention provides that each contracting state shall accord to the aircraft of other contracting states the same treatment as accorded its own aircraft with reference to charges and facilities in connection with the use of public airports, similar provisions being found in the Paris and Habana Conventions. Habana Convention, see State Department Treaty Series 840; Paris Convention, October 13, 1919, State Department publication 2143."

The two volume "Proceedings of the International Civil Aviation Conference", (1948) State Department Publication 2820, nowhere indicates that implementing legislation by the United States was believed to be needed to make the Convention fully effective as to it. The annual "Treaties in Force" publication of the

Department of State has continually listed the Chicago Convention as a treaty in force.

The Convention has been twice amended in minor respects by the United States and upon each occasion the United States Senate has advised ratification and the President has re-proclaimed the Treaty (June 14, 1954, 8 U.S.T. & O.I.A. 179, T.I.A.S. 3756 (effective December 12, 1956); February 21, 1961, T.I.A.S. 5170 (effective July 17, 1962)).

As pointed out by Judge Lieb (R. 410) the State Department made no request for implementing legislation when seeking original ratification (R. 410). Neither did it seek such legislation when, 10 and 16 years after ratification, it sought amendment. Nor does it appear that the Foreign Relations Committee of the United States Senate has ever requested a draft of proposed legislation to implement the treaty.

The interpretation of the Convention by the departments having responsibility is not binding on this Court but is entitled to great weight (see authorities, *supra*, p. 22).

Little can be added to the district court opinion devoting ten pages to careful analysis of the judicial decisions pertaining to the question of the self-execution of treaties (R. 402-411).

The Court of Appeals reached its conclusion that Article 15 was not "fully effective" only through a strained and unreasoned construction of Article 82 of the Chicago Convention.

B. The Higher Rate Charged Braniff Airlines Cannot Be Accepted As the Criterion Established By Article 15 of the Chicago Convention.

As a second ground of decision, the court below said (App. A, p. 10a):

> "Appellees, on the other hand, have at all times been afforded uniform conditions. The same charges were made against them as against Braniff, an American national flying internationally. They were a part of the same class for the purpose of charges and the contracting airlines, upon the expiration of the twenty year contracts, will join that class."

The court, thus finding two sets of national standards of charges to exist, has seized upon that of a minute factor in the United States air transport industry and thus contrived to bar petitioners from their clear treaty right to equality with the low rates of the major United States airlines that are petitioners' principal competitors.

This violates the State Department's steadfast policy of insisting that the standard contemplated by a treaty agreement for "national" treatment means first-class treatment. In this connection, see policy of State Department relative to treatment of American Jews in foreign countries, rejecting the argument that they are only entitled to second class treatment where native Jews are given such treatment. Hackworth, Volume III, Section 286. See also *Iannone* v. *Radory Construction Corp.*, (N.Y.) 285 App. Div. 751, 141 N.Y.S. 2d 311 (1955), aff'd per curiam, 1 N.Y. 2d 671 (1956).

As pointed out by the trial court in its opinion (R. 401) this Court has already answered a similar con-

tention made in *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150. There Puerto Rico sought to justify its statutory violation of a treaty for protection of trade marks by pointing out that its statute operated to bar from treaty benefits a certain class of its own nationals as well as a class of citizens of Cuba. This Court held (p. 164):

> "In this view, the contention that a ratifying State, on due registration of a foreign mark in accordance with the treaty, is not bound to protect the owner in the use of that mark provided it refuses that protection to its own nationals necessarily fails. Undoubtedly the Contracting States are bound respectively to give to the nationals of the other Contracting States the same rights and remedies that are extended to their own nationals. . . . When protection is sought for such marks a ratifying State cannot escape the obligations of the treaty and deny protection by the simple device of embracing its own nationals in that denial. That would make a mockery of the treaty."

The Preamble of the Convention states (61 Stat. 1180):

> "Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and *that international air transport services may be established on the basis of equality of opportunity* and operated soundly and economically; (Emphasis supplied)

Article 44 states that among the aims and objectives of the International Civil Aviation Organization set up by Part II of the Chicago Convention is to foster the planning and development of international air transport so as to:

> "Insure that the rights of contracting States are fully respected and that *every contracting State has a fair opportunity to operate international airlines.*" (Emphasis supplied)

The conflict between the lower court's interpretation and the plain purpose of the parties thus manifested is emphasized by the facts of competition in this case.

Of the ten Latin-American States represented by the ten petitioners, Braniff flies only to Brazil, Colombia, Panama, Ecuador, and Peru. The only other Latin-American state it serves is Paraguay. On the other hand, Pan American serves every country in Latin America. Braniff, operating internationally only since 1955, carries but 2 per cent of the total international traffic at Miami. Pan American carries about 64 per cent. The petitioner airlines are all in direct competition with Pan American, which at the Miami airport handles probably ten times the traffic that is handled by the largest of the petitioners. The competition of Braniff is thus *de minimis*; that of Pan American is pervasive, keen, and unremitting.

Read in the light of these facts, and with due regard to the stated and agreed purpose of the treaty to permit every State to establish air transport services on the basis of "equality of opportunity," the lower court's decision makes of Braniff a mere stalking horse and the covenant of Article 15, a transparent sham.

This role of Braniff is confirmed by the Port Authority's contract with Braniff approved January 16, 1962, subsequent to the trial of this case and providing for Braniff a reduction in airport charges retroactive to July 1, 1961; Braniff was also guaranteed parity

with any reduced rates that may ultimately be obtained by petitioners in this case (R. 700-703). Petitioner's motion in the District Court to add this contract to the record was denied by the District Court partly in reliance upon the Port Authority's stipulation to forego reliance on the Braniff argument on appeal (R. 719-719½; App. D, pp. 29a-30a). Without acting on renewal of the same motion in the Court of Appeals (R. 692-719½) and respondent's objections thereto (R. 721-730), the Court of Appeals in its opinion not only ignores this new Braniff contract but adopts defendant's argument made in breach of its stipulation (App., p. 10a).

It is submitted that the lower court's holding that conformity of petitioners' Miami airport charges with the charges exacted of Braniff satisfies the requirement of Article 15 so far departs from the course of judicial procedure charted by this Court as to require exercise of the supervisory powers of this Court.

C. The Opinion of the Court Below With Respect to Most-Favored-Nation Rights Rests on a Spurious Issue Wrongly Decided

The lower court attempts to lay a false foundation for its conclusion by asserting (App., p. 8a): "The private rights of appellees with which we are concerned arise under the Treaty . . . and include benefits from most favored nation clauses. *Suntoyincenzo* v. *Egan*, 1931, 284 U.S. 30 . . . "

With this false premise, the Court then cites and relies upon the decisions of this Court that gave effect in 1887 and 1888 to the traditional "conditional" most-favored-nation policy of the United States: Under the

most-favored-nation clause, the benefit of concessions or reductions of duties made to a third state by either contracting Power accrued to the other contracting Power freely if freely made to the third State; but they accrued to the other contracting Power only in return for an equivalent, if they were made to the third State for a valuable consideration in the form of a reciprocal concession or reduction. See 3 Hackworth, Digest of International Law, § 301, pp. 269-270.

The premise is false and the conclusion is erroneous in law.

(1) The question of rights under a most-favored-nation clause is a spurious issue.

The lower court's statement that petitioners' asserted rights under the Treaty include benefits from most-favored-nation clauses is palpably false. Casual or detailed scrutiny of the Chicago Convention will fail to disclose in that Convention a single "most-favored-nation" clause. The petitioners have never contended that it contained one.

Most-favored-nation clauses were expressly rejected in the drafting of the Convention.— The fallacious nature of the issue attempted to be injected by the court below is apparent from the legislative history of Article 15 upon which petitioners rely. Reference to the legislative history of the Treaty is of course a permissible aid to construction (*United States* v. *Texas*, 162 U.S. 1, 23; *Terrace* v. *Thompson*, 263 U.S. 197, 223; *Nielsen* v. *Johnson*, 279 U.S. 47, 52. The United States draft of a "Proposal of a Convention on Air Navigation" submitted to the International Civil Aviation Conference at Chicago, Document No. 16, included in Section 9 a provision that any fees or charges levied against air-

craft in transit "shall not be greater than those imposed upon national aircraft or aircraft of the most-favored nation"; and in section 22 there was included a provision that the scale of fees for landing of aircraft of one contracting party at public airports of another contracting party "shall be no greater than that applicable to national aircraft or to aircraft of the most-favored-nation." (Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1-December 7, 1944, Department of State Publication 2820, Doc. No. 16, pp. 554, 557, 561). The Commentary on the Development of the Individual Articles of the Convention on International Civil Aviation (id., pp. 1380, 1383-1384) adequately discloses the fate of the United States proposal of "most-favored-nation" clauses:

> "*Article 15, Airport and similar charges*, represents a combination of Articles 9 and 22 of the United States draft convention. The drafting committee was asked by the fifth meeting of Subcommittee 2 to revise Article 22 in the light of the instructions on Article 9 referred by the fourth meeting, to make it clear that there is no obligation implied to treat domestic aircraft the same as international, and to substitute a new phrase for 'aircraft of the most-favored-nation.' The committee was also asked to eliminate any duplication between the two articles. The drafting committee's revision (Article 14; Doc. 414) was discussed at the final meeting of the Subcommittee and was referred back with four suggestions for changes. The revised article (Article 15, Doc. 454) was considered by the December 2 meeting of Subcommittees 1 and 2, in conjunction with Article 68. It was decided to delete subparagraph (b) of the latter, and transfer the proviso to Article 15. The article as so revised was incorporated in Document 467, and was approved at the joint meet-

ing of Subcommittees 1, 2 and 3 held December 4, subject to a reservation by Cuba.'"

The States of which petitioners are nationals were all represented by delegations to the Chicago Conference that drafted the Chicago Convention. Many of the members of these delegations are still alive. The lower court's attempt to pervert the Convention into a most-favored-nation clause arrangement is an affront to their intelligence.

(2) Even if the issue of a most-favored-nation clause were presented, the court below decided it erroneously.

In 1923 the United States policy was changed under the guidance of Secretary of State Hughes. He explained the reason for the change in a letter to Senator Lodge (5 Hackworth, Digest of International Law, p. 273):

> "... It was the interest and fundamental aim of this country to secure equality of treatment but the conditional most-favored-nation clause was not in fact productive of equality of treatment and could not guarantee it.... As we seek pledges from other foreign countries that they will refrain from practicing discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favored-nation treatment."

This basic change in policy of the United States is well-recognized. *John T. Bill Co.* v. *United States*, 104 F.2d 67, 71, 74 (C.C.P.A. 1939); 5 Hackworth, Digest of International Law (1943) pp. 271-277; 1 Oppenheim (Lauterpacht) International Law (8th ed. 1955) § 580, pp. 972-973.

It follows that, even if the 1944 Chicago Convention included a most-favored-nation clause, and it does not,

the lower court's reliance on the decisions of this court (*Bartram* v. *Robertson*, 122 U.S. 116, etc.) was misplaced in that it ignores forty years of history.

(3) Confusion of "most-favored-nation" clauses with a clause granting "national" treatment is without justification on any ground.

This court has found no difficulty in distinguishing between the meaning of a "most-favored-nation" clause on the one hand (*Rocca* v. *Thompson*, 223 U.S. 317; *Santovincenzo* v. *Egan*, 284 U.S. 30, 35) and a "national" standard on the other (*Asakura* v. *Seattle*, 265 U.S. 332, 341; *Nielsen* v. *Johnson*, 279 U.S. 47; *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 158, 164; *Clark* v. *Allen*, 331 U.S. 503, 508). The ministries of the States whose airlines are here petitioners are equally aware of the distinction and are quite aware of just what the court below has done while purporting merely to construe the Chicago Convention.

More than mere casual error of a court of appeals is here involved. The circumstances require exercise of this court's supervisory jurisdiction.

D. The Big Four Furnished no Valuable Consideration for Their Preferential Landing Charges Enjoyed Under Their Lease Agreements

Pivotal to the determination of the lower court as to the feigned most-favored nation issue, and pervading the opinion generally as a vague background equitable consideration,[18] is the erroneous impression that

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[18] Contrary to the implications of the court of appeals opinion, (App. A, p. 10a, and n. 4) we do not contend that the Convention requires that the Big Four agreements be set aside. Nor have we at any time sought such relief. However, it seems clear that if the Big Four contracts were violative of the provisions or policy of the Chicago Convention, they could not be sustained under *Haver* v.

the Big Four, including Pan American, furnished to the Port Authority valuable consideration for the 20-year grant of low landing charges and exemption from other charges.[19] The Court of Appeals refers to the Big Four agreements as imposing on those lessees a duty to the airport to sustain any losses (App. A, pp. 4a, 5a, 13a). It also quotes a C.A.A. letter that accepts the mythical duty as an "underwriting" (App. A, p. 7, note 3).

Even casual examination of the Big Four lease form (R. 632-642) discloses that this "sustaining" or "underwriting" duty of the Big Four was illusory. The contract imposed on each member of the Big Four a burden as to operating losses no greater than was to be borne by every other operator landing at the airport during the year the operating deficit should be sustained.

The provision relied upon is Article II, para. 5(d) in the form of lease agreement with each of the Big Four (R. 637):

Yaker, 9 Wall. 32 (cited by the court of appeals (App. A, p. 10a, n. 4)) but would yield to the supervening exercise of the treaty power. *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 229, 230; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U.S. 467; *Highland* v. *Russell Car Co.*, 279 U.S. 253, 261; *Norman* v. *B. & O. R. Co.*, 294 U.S. 240, 309-310; *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 680.

[19] Of course, even if there was such consideration, this would not be ground for writing into the treaty any exception with respect to the contracts of the Big Four. As this Court said in *The Amiable Isabella*, 6 Wheat. 1, 72: "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice."

"(d) In the event the revenues of the Authority from sources other than the rents paid by air transportation companies for space at the Airport exclusively occupied by them shall be insufficient in any fiscal year to pay all operating expenses, such deficit shall be carried over into the budget as an operating expense for the succeeding year. The Lessee *and all other air transportation companies operating on the Airport* shall, within thirty days after written demand therefor, pay a special assessment sufficient to make up said deficit, *which assessment shall be apportioned among said companies ratably* in accordance with the number of flights scheduled to land at the Airport during the fiscal year in which such deficit occurred. . . ."

In passing, it may be noted that this obligation was to continue only until the original $2,500,000 revenue bond issue delivered to Pan Am for its airport, was redeemed (Lease Agreement, Art. 27, R. 641) and, as the trial court found, the obligation did terminate on July 1, 1947, when the issue was redeemed (R. 399).

Both courts overlooked that the "sustaining" duty as to airport operating losses was not, by the lease agreement provisions, imposed on the Big Four alone. On the contrary, as is evident from the words italicized in the subparagraph quoted above, the members of the Big Four agreed merely to pay their fair share of any annual operating deficit, a share equal to the portion of the total loss reasonably attributabe to the respective use of the airport made by each of them. The proration of the loss was among each of the Big Four *and* "all other air transportation companies operating on the Airport" measured by the relative number of scheduled landings of each in the year of the deficit.

Each of the Big Four, by its lease agreement, contracted to do no more than a non-contract airline would

have been required to do, viz., pay an additional amount representing the actual cost of its own use of the airport determined on a pro rata basis.[20] Whether or not the ratable portion of operating losses of a non-contracting carrier would have to be collected by increased landing charges in the second year, because it was not party to a contract for "assessment", or by voluntary payment of an assessment of its share of the deficit is irrelevant. Each member of the Big Four was manifestly under no contractual duty to bear more than its proportionate share of the total operating losses, and their total shares would not equal more than the proportionate share of the total properly allocable to them as a group. The "valuable consideration" founded on the assumption that the Big Four were bound to sustain any losses of the airport and were "underwriters" of the bond issue is obviously a myth.

The facts with respect to this "valuable consideration" disclose an additional absurdity in the lower court's reliance on the "most-favored-nation" clause ruling. Clearly, even the conditional "most-favored-nation" policy of the United States in force until 1923 recognized that the other contracting party should have opportunity to furnish "valuable consideration" equivalent to that furnished by the favored nation.

Here, petitioners had no such opportunity. As previously stated, supra, p. 13, none of the ten petitioners

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[20] It is worth noting that while the Big Four were required to bear only their respective shares of total losses, the right to participate in profits during the period the $2,500,000 bond issue was unredeemed, was limited to the Big Four and did not extend to the other airlines using the airport. See opinion of the trial court (R. 400).

was operating, or authorized by the C.A.B. to operate, into Miami during any of the period prior to July 1, 1947, in which Art. II, para. 5(d) of the Big Four lease agreements remained in effect. Consequently, they could never have offered or given to the Port Authority the same consideration (even if the Airport would have been willing at any time during such period to have entered into agreements with petitioners similar to those given the Big Four).

There was no evidence that any of the petitioners, after it obtained authority to operate into Miami was by the Port Authority afforded opportunity to sign leases or contracts (either with a sustaining obligation or including any other valuable consideration) that embodied the preferential landing charges enjoyed by the Big Four. Indeed, when petitioners, at various times did seek 10, 15 or 20 year leases of space and structures at the airport, they were in almost every instance refused.[21] For years they were forced to rent on a month-to-month or year-to-year basis.

The assumption that the preferential landing charges to the Big Four may, on some vague equitable principle, be justified because they assumed a "sustaining" burden in the airport's early years is nothing more than a carefully nurtured myth.

E. Independently of the Chicago Convention, the Bilateral Agreements Confer Rights that Adequately Support the Judgment of the District Court

Entirely apart from the Convention, the Air Transport Services Agreements (commonly known as "Bilateral Agreements" or "Bilaterals") in the cases of

[21] Deposition of the Director of Dade County Port Authority pp. 44-46, Plaintiffs' Exhibit 33.

seven of the ten petitioners confer on them the right to equality of airport charges for foreign airlines here involved and support the decree of the District Court as to these seven. The trial court so found (R. 391, 401, 426, 435)

These Executive Agreements executed over the years beginning in 1946, in substance follow the model Standard Agreement adopted at Chicago as part of the Final Act of the Convention on International Aviation.[23] The bilaterals here involved and the pertinent article number in each are set out above, pp. 5-6. For convenience, that of the Ecuadorian agreement, typical of those here in suit, is here repeated. It provides:

> "ARTICLE 3
>
> "In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:
>
> "(a) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services."

If anything, this clause is more specific than Article 15 of the Chicago Convention. It requires that the charges imposed by the airports of each nation on the aircraft of the other be: (1) just; (2) reasonable; and (3) equal (i.e. not "higher than would be paid"

[23] Proceedings of the International Civil Aviation Conference, Chicago, Illinois, Nov. 1-Dec. 7, 1944, Department of State Publication No. 2820, p. 128.

by "its national aircraft engaged in similar international services." Each of the bilaterals applies to the Miami International Airport, as appears from the route annexes of each, specifying airline routes that include as the United States terminal point, Miami, Florida (which can be served only through the Miami International Airport).

The Court of Appeals does not even acknowledge the existence of the Air Transport Services Agreements in its opinion except to mention that the Panama Agreement "for the purpose of this case, is as effective as the Chicago Convention." (App. A, p. 2a). The omission of the Court of Appeals to deal with the bilateral agreements was, of course, inadvertent and the result of oversight. However, there are certain distinguishing characteristics of the bilateral agreements that cannot be overlooked.

(1) The Bilateral Agreements have equal dignity with formal treaties.

The bilateral agreements are all classified by the State Department as Treaties in Force. The parties in the case at bar treated the Bilateral Agreements as having equal status with the Chicago Convention (R. 83-84). The District Court held that the Bilaterals are compacts having dignity equal in every respect with that of formal treaties (citing *United States* v. *Pink*, 315 U.S. 203; *United States* v. *Belmont*, 301 U.S. 324, 330-331; *State of Russia* v. *National City Bank*, 69 F. 2d 44, 48; *Colonial Air Lines, Inc.* v. *Adams*, 87 F. Supp. 242) (R. 390-391).

Attorney General Tom C. Clark on June 18, 1946, rendered an opinion to the Secretary of State sustaining the validity and binding effect of Commercial Aviation Agreements (the Bilaterals) between the United

States and other nations. 40 Op. A.G. 451. He held them clearly contemplated and authorized by the Civil Aeronautics Act of 1938.

(2) The bilateral agreements contain no provision comparable to Article 82 of the Chicago Convention.

The bilateral obligations as to national treatment at the airports of each country are unequivocal obligations containing no provisions such as Article 82 of the Chicago Convention upon which the Court of Appeals pitched its argument that Article 15 of the Convention was unenforceable. The petitioners grounded their actions on the bilaterals as well as on Article 15 of the Chicago Convention (R. 155-156). The District Court held that airlines of the nations that have such bilaterals had a cause of action and were entitled to injunction and refunds under the independent force of the bilaterals as well as under the Chicago Convention (R. 391, 401, 426). The opinion of the court of appeals, as stated above, fails to deal with the issue.

It is important to note that the same type of Executive Agreement pertaining to air transport services has been executed with many new countries as the expanding reach of United States airline enterprise required. These embodied the same stipulation as to reciprocal equal airport charges. Presumably, the State Department was thereby indicating to the other parties its continued adherence to the principle of unconditional equality of airport charges with those made to national aircraft. Some of the bilaterals were negotiated at the time of the Convention at Chicago and several, including two involved in this case became effective even before the effective date of the Chicago Convention: Brazil, effective October 6, 1946; Peru,

effective December 27, 1946. Regarding the bilaterals as binding and effective, the State Department, on behalf of United States airlines has invoked and will continue to invoke the bilaterals, as well as the Chicago Convention, for the protection of American airlines both in Latin America and elsewhere.

As noted above, the bilaterals contain no provision even remotely resembling Article 82 of the Chicago Convention, or any other provision upon which the court of appeals could rely as an avenue for escape by the Port Authority from the duty of equal treatment that they impose.

Whatever the reason for the omission of the court of appeals to deal with the point, it is submitted that when a court of the United States denies claimed rights of nationals of seven countries under international agreements, it owes to the United States as well as the foreign nations the courtesy of more than its mere *ipse dixit*—"Reversed".

2. The Issues Here Involved are of Great and Continuing Importance to the Petitioners, to Their States and to the United States.

The basic right to equality of airport charges in international civil aviation is nothing new. It has long been regarded as a fundamental principle in international air transportation. It was embodied in the Paris Convention of 1919 (App. E, pp. 32a-33a) and unequivocally restated in the Habana Convention of 1928 (*supra*, p. 28, n. 16). It is not surprising that the Chicago Convention again reenacted this principle.

The States of Latin America cannot, of course, be reasonably expected to accept the lower court's deci-

sion as the ultimate resolution of the issue here. As the necessary result of the decision, and so long as it controls, their airlines will continue to pay airport charges in the United States that are 18 times higher than those paid by their United States airline competitors. Ninety per cent of all traffic between Latin America and the United States moves through the Miami gateway. Under the preferential system of Miami airport charges now sanctioned and perpetuated by the court of appeals decision, the average charge for aircraft of the United States airline, Pan Am, is $4.05 per landing; for aircraft of petitioners, $71.70 per landing (App. C, p. 27a).

If these circumstances remain unchanged, they can serve only as a continuing source of friction in Latin-American relations. International air transport is so important to the economic life of the majority of Latin American States that in many instances their airlines are owned in whole or in part by their governments.

History repeats itself. This case is reminiscent of substantially the same problem presented half a century ago with respect to rail carriers in the *St. Louis Terminal* case.[24] There this Court's decree required that all existing or future carriers be permitted to use the facilities of the terminal company on a plane of equality with all other carriers and, if they so desired, be permitted to acquire joint ownership of the terminal company with the other proprietary carriers.

The multi-lateral Chicago Convention now has 98 contracting States. It was proclaimed by the State Department spokesman before the Senate Foreign Relations Committee as being a "'constitution' for

[24] *United States* v. *St. Louis Terminal*, 224 U.S. 383, 411.

the postwar air world" (App. E, p. 34a). The case also involves the first occasion for vindication in a United States court of Executive Air Transport Services Agreements with the United States. The United States has executed 49 similar bilateral agreements of which seven are here involved. They are given full force and effect by the district court to grant petitioners' relief; in the court of appeals they are completely ignored and petitioners' bilateral treaty rights are nullified without the slightest pretext of reason.

The case is not without importance to the larger interests of the United States. It has an interest in the continuing growth of its international airlines as well as the promotion of better understanding among the peoples of the world.

CONCLUSION

It is respectfully submitted that writ of certiorari should issue in this case to review the decisions of the Court of Appeals for the Fifth Circuit in these cases.

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November, 1962

APPENDIX A

Opinion of United States Court of Appeals, Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19476

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY, *Appellant*,

v.

AEROVIAS INTERAMERICANAS DE PANAMA, et al., *Appellees*.
(AND REVERSE TITLE)

No. 19632

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY, *Appellant*,

v.

LINEAS AEREAS DE NICARAGUA, S. A., *Appellee*.
(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida

(August 31, 1962)

[OPINION]

Before TUTTLE, Chief Judge, BELL, Circuit Judge and CARSWELL, District Judge.

BELL, Circuit Judge: These consolidated appeals are from final decrees of the District Court holding that appellant may not charge the foreign airlines according to its usual schedule of charges for landing and other aviation fees and for fees paid concessionaires by the appellees and

in turn paid to appellant, but must give them the benefit of lower charges to which four others are entitled by virtue of contracts. The decrees also awarded judgments for the amount of the excess charges paid by appellees and their suppliers since 1955, together with interest.[1]

Appellant owns and operates the Miami International airport. Appellees are ten Latin American airline corporations and have made substantial use of the airport facilities in international operations during recent years. Their cause of action is premised on Article 15 of the provisions of the Convention on International Civil Aviation, the "Chicago Convention", which became effective as a treaty between the ratifying states on April 4, 1947. 61 Stat. 1180. This treaty was ratified by the United States of America and by, among others, the countries of which appellees are nationals. The Republic of Panama did not ratify the treaty until January 18, 1960, but appellee Aerovias Interamericans de Panama, S.A., relies on an executive agreement between the Republic of Panama and this country which became effective April 14, 1949 and which, for the purpose of this case, is as effective as the Chicago Convention.

That Convention provided, in setting out principles and arrangements for the development of International Civil Aviation on the Basis of equality of opportunity, as follows: (Article 15)

> "Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft or any other contracting State shall not be higher,

[1] The memorandum opinion of the District Court in case No. 19,476 is reported in 197 F. Supp. 230 to which reference is made for a detailed statement of the facts here involved. The court entered finding of facts and conclusions of law in case No. 19,632. The cases were consolidated for consideration by this court.

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engade in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

The District Court construed this article in a favored nation clause concept, but refused to consider it on the basis of determining the presence or absence of discrimination. It was treated as being an absolute requirement to the end that charges against appellees could be no higher than the lowest charges or rates paid by American nationals, no matter what the classification or circumstances. We disagree and reverse.

The dispute centers around the fact that two separate schedules of charges were effective at the airport; one schedule being based on contracts made at or near the time the airport opened for business in 1946, and the other being based on Resolution No. 56 of appellant setting charges applicable to all aircraft except those of the companies who entered into the contracts. The facts are not in dispute and our decision turns on the construction of the Chicago Convention treaty in light of the undisputed facts.

At the close of World War II, Pan American Airways, Inc. owned the 36th Street Airport near the City of Miami in Dade County, Florida, embracing 223 acres of land. The United States of America owned the adjacent Convair property consisting of 102 acres and both tracts were improved by various airport facilities. Eastern Airlines, Inc., Delta C & S Airlines, Inc. and National Airlines, Inc. were using the facilities of the 36th Street Airport under an arrange-

ment with Pan American. Only Pan American was flying internationally.

The Board of County Commissioners of Dade County was authorized by the Florida Legislature in 1945 to establish airport facilities to be financed by ad valorem taxation on property within the county, and by revenue bonds payable solely from the revenues of any facility established. Pursuant to this statutory authority, the county commissioners acting as the Dade County Port Authority issued twenty year bonds in the principal amount of $2,500,000 payable only from anticipated revenues. These were exchanged with Pan American Airlines, Inc. for a deed to the 36th Street Airport. Appellant simultaneously borrowing $700,000 from Eastern Airlines with which to purchase the Convair property. This vested title to an existing 325 acre airport in appellant with no cash outlay. At the same time appellant entered into contracts with Pan American and Eastern whereunder Pan American leased a portion of the airport for the term of the revenue bonds and Eastern leased the Convair property for the same term. Pan American and Eastern, because of the indebtedness of the Authority, were committeed to the airport from the beginning but leases were also tendered to other airlines at the same time. National, Delta, and Taca Airways Agency, Inc., a corporation of El Salvador engaged in international service, all accepted identical twenty year leases with the amount of rent depending on space taken. Each lease contract provided that appellant and the lessees would share in the profits of the airport, and sustain it in losses for as long as appellant desired to be so sustained. The contracts required appellants to provide without expense to lessees the necessary facilities for governmental agencies such as the weather bureau, health services, and immigration and customs. Each lease set forth the same schedule of aviation fees to be charged, based on a graduated scale for flights scheduled, plus landing weight of the

aircraft. The lessees and their suppliers were not to be otherwise charged for the use of the airport facilities. Each contract provided that the Authority could redeem the bond issue at any time and in such event the provision of the contracts providing for the sharing of profits and losses would become ineffective. Each lessee had the option of continuing under the contracts, save for that part, or of entering into a new ten year lease calling for rentals and airport charges comparable to those charged by comparable United States airports.

Appellant commenced operations at the airport on March 23, 1946 with a small staff, offering domestic service only. A schedule of charges applicable to airlines who did not commit themselves to the long term contract was published at that time. On September 24, 1956 appellant adopted Resolution No. 56 setting forth a permanent schedule of charges applicable to all aircraft using the facilities except aircraft of the lessees under the contracts. Appellees commenced using the facilities thereafter, one as early as 1948, and another as late as 1960, and were charged on the basis of Resolution No. 56. These charges exceeded those paid by the lessees in respect to landing charges and included the following, none of which were required of the twenty year lessees: passenger terminal charges, cargo terminal charges, and concessionaire charges imposed on the supplier and passed on to appellees, based on five per cent of the gross sales price of gasoline, oil and meals purchased by appellees.

The growth of the airport was rapid and after little more than a year of operations appellant redeemed the original bond issue with part of the proceeds of a new issue. The profit and loss sharing arrangement under the contracts was terminated and the five contracting airlines elected to continue the use of the facilities for the remaining almost eighteen years under the favorable schedule of charges

under the contracts, rather than entering into new ten year leases whereunder the charges would have been increased.

The facilities of the airport were greatly expanded and finally in 1955 it was moved to a new location. The contracts of the five original lessee airlines will expire December 31, 1965. In the meantime, Taca terminated services to Miami and its contract was mutually cancelled.

The background facts demonstrate that various airlines, other than those having the original contracts, have long been dissatisfied with the charges under Resolution No. 56 in view of the lower charges under the contracts. For example, Pan American on behalf of its subsidiary corporation, Cubana de Aviacion S.A., sought to obtain for it the rates afforded to Pan American under the contract. The matter was arbitrated and the contention of Pan American for Cubana was rejected.[2]

Complaints against the charges filed by KLM Royal Dutch Airlines and British South American Airways, Inc. in 1949 were denied, as well as the complaint filed in 1955 by Braniff International Airways, Inc., a United States airline flying internationally. Braniff has paid the same charges as those paid by appellees, all under the provisions of Resolution No. 56. All are engaged in international operations. Only Pan American of the original five lessees is now engaged in international operations. National was for some years but discontinued after the Cuban upheaval.

Some of appellees sought relief, to no avail, from the Civil Aeronautics Board and the Civil Aeronautics Authority in 1953. Their claim then was based on discrimination which the administrator of Civil Aeronautics noted would

[2] Cubana, along with two other Cuban airlines were plaintiffs in this action but the court granted no direct relief to any of the three because of the "rapidly changing political situation in the Republic of Cuba," simply retaining jurisdiction as to the three.

terminate with the expiration of the twenty-year contracts—December 31, 1965.[3]

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[3] The administrator of Civil Aeronautics, in pertinent part, replied:

"In your letter it is alleged that the Dade County Port Authority, which owns and operates the Miami International Airport, is unjustly discriminating against all carriers using that airport other than Pan American World Airways, Eastern Air Lines, Delta C & S Air Lines, and National Airlines (hereinafter referred to as the 'sustaining airlines') because of the differences in the rates and charges imposed against those four carriers and those imposed against all other carriers for the use of the landing area and other public use areas and facilities of the airport. • • •

"• • • the differential in rates and charges imposed against the sustaining airlines for the use of the landing area and other public use areas and facilities of the Miami International Airport and those imposed against all other carriers for use of such areas and facilities does not constitute unjust discrimination against such other carriers, within the meaning of the provisions of the grant agreements between the Dade County Port Authority and this Agency which obligate the Port Authority to operate the airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. • • •

"The rates and charges now being imposed against the sustaining airlines are those that were fixed by agreements entered into between the Port Authority and those airlines in 1945. In view of the pertinent circumstances prevailing at that time, it is the view of this Agency that the Port Authority acted reasonably in entering into such agreements, which, by their terms, were binding on the parties thereto for a term of 20 years.

"In reaching this conclusion we have taken into consideration, among other things, (1) the provision in each of the agreements which, in effect, constituted an underwriting of the bonds then being issued by the Port Authority to finance the acquisition from Pan American Airways of the Miami airport; (2) the fact that in order to market the bonds it was necessary at that time for the Authority to provide some type of security other than the then anticipated but unknown revenues, such as was provided in the underwriting of the

The private rights of appellees with which we are concerned arise under the Treaty, *Edye* v. *Robertson*, 1884, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798, and include benefits from most favored nation clauses., *Santovincenzo* v.

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bond issue by the sustaining airlines; (3) the fact that the schedule of landing fees and charges prescribed in the original lease agreements with the sustaining airlines compares favorably with landing fees and charges at other comparable airports in effect at the time; (4) the fact that similar agreements were offered to all other carriers then operating on the Miami International Airport; and (5) the fact that it was not unusual in 1945 for an airport owner to enter into agreements with airlines providing for the leasing of space on the airport and the use of the landing facilities at prescribed rentals and landing fees and charges, for terms of 15, 20 and 25 years. • • •

"Our study of the matter has also disclosed that the rates and charges now being imposed against all carriers and their suppliers, other than the sustaining airlines and their suppliers, compare favorably with the rates and charges now being imposed at other comparable airports. It is our opinion that such rates and charges are fair and reasonable in the light of all pertinent circumstances now prevailing.

"The unjust discrimination provisions incorporated in grant agreements pursuant to the Federal Airport Act, in our opinion, do not require that the airport owner refrain from charging users of the airport, rates higher than those to which other users of the same class are entitled under previously executed contracts which were reasonable when executed (see *Trans World Airlines, Inc.* v. *City and County of San Francisco*, U.S.C.A. 9th, Dec. 19, 1955, 228 F. (2d) 473, 4 Avi. 17, 866, cert. den. April 30, 1956). • • •

"Insofar as concerns the landing fees ad charges to be imposed against the sustaining airlines after December 31, 1965, it is to be noted that the 1955 amendatory agreements between those airlines and the Port Authority which revised and extended the 1945 agreements, provide that such landing fees and charges will be renegotiated six months prior to the expiration of the original terms of the agreements, in the light of the circumstances then prevailing. Under this provision, it appears that the Port Authority will be in a position to negotiate landing fees and charges to be imposed against the sustaining airlines after December 31, 1965, that are then in

Egan, 1931, 284 U. S. 30, 52 S. Ct. 81, 76 L. Ed. 151. And in construing the treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose. *Wright* v. *Henkel*, 1903, 190 U. S. 40, 23 S. Ct. 784, 47 L. Ed. 948; *The Yuba*, 5 Cir., 1934, 71 F. 2d 635, cert. den., 293 U. S. 589, 55 S. Ct. 104, 79 L. Ed. 684; and *Hidalgo County Water Control & Imp. Dist.* v. *Hedrick*, 5 Cir., 1955, 226 F. 2d 1. We proceed also under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to rights claimed under it, the latter is to be preferred. *De Geofroy* v. *Riggs*, 1889, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642; *Asakura* v. *Seattle*, 1924, 265 U. S. 332, 44 S. Ct. 515, 68 L. Ed. 1041; *Jordan* v. *Tashiro*, 1928, 278 U. S. 123, 49 S. Ct. 47, 73 L. Ed. 214; and *Baggrdi Corp. of America* v. *Domenech*, 1940, 311 U. S. 150, 61 S. Ct. 219, 85 L. Ed. 98.

The clear purpose of the treaty here was to develop international civil air transport services on the basis of equality of opportunity. The contracting nations agreed to apply their laws and regulations to the aircraft of all contracting states without distinction as to nationality. A permanent organization was established under the treaty to further its purposes, including the aviodance of discrimination between the contracting nations. Each airport in the contract-

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substantial conformity with those then imposed against all other carriers.

"In this connection, your attention is invited to Resolution No. 11144 of the Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority, adopted February 14, 1957, wherein the Port Authority warranted that on or before December 31, 1965 it will 'review its entire schedule of rates, tariffs, fees, and charges for users of airport facilities of the Authority, in all respects, in the light of circumstances and of facts that then and there exist, and, where necessary, modify, revise, or change said rates, tariffs, fees, and charges, so that they will then and there meet the legal requirements of being fair, reasonable, and not unjustifiably discriminatory or otherwise contrary to law.' * * *"

ing nations open to public use for aircraft of its nationals was to be open under uniform conditions to the aircraft of the other contracting nations.

There is nothing whatever in the treaty that would deprive the contracting airlines here of the fruits of their bargain, made before the treaty became effective, nor that would require appellant to afford the same bargain to appellees.* Appellees, on the other hand, have at all times been afforded uniform conditions. The same charges were made against them as against Braniff, an American national flying internationally. They were a part of the same class for the purpose of charges and the contracting airlines, upon the expiration of the twenty year contracts, will join that class. The present separate classifications of the two groups will then cease to exist and Article 15 of the treaty will become fully effective.

That this is a clear import of the treaty is demonstrated by Article 82 thereof which recognizes outstanding inconsistencies, and requires the use of best efforts by the contracting states to secure the termination of any such inconsistency:

> "The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State

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* Although it is not a point urged, we note that these contracts were executed after the negotiation of the treaty in 1944 but before it became effective in 1947. With respect to private rights, unlike rights of the governments involved, a treaty is effective only from the exchange of ratifications and does not relate back to effect private rights vested prior to that date. *Haver* v. *Yaker*, 1870, 9 Wall. 32, 19 L. Ed. 571.

inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention."

Of course, the treaty was effective immediately except as to these inconsistencies but its terms, insofar as applicable here, would not become completely effective until the termination of these outstanding contracts, either at the instance of this government or upon the expiration of the terms of the contracts. Cf. *De Geofroy* v. *Riggs*, supra, where the treaty with France permitted aliens of either country to inherit from citizens of the other, and the president of this country was to urge changes in inconsistent state laws. The treaty was effective immediately in states with consistent laws.

Appellees cannot rely in the courts on what was to be done in the future by this government to remove infra-territorial inconsistencies such as these contracts. This is a matter that addresses itself to the political branch of the government. *Foster and Elam* v. *Neilson*, 1829, 2 Pet. 253, 7 L. Ed. 415 and *Roberston* v. *General Electric Co.*, 4 Cir., 1929, 32 F. 2d 495. Thus, it is that appellees will have no cause of action under the treaty until the contracts in question are terminated, or until they expire by their own terms.

But there is yet another reason why this cause fails. Favored nation clauses may be inapplicable in situations where exceptions are made for valuable consideration. *Bartram* v. *Robertson*, 1887, 122 U. S. 116, 7. S. Ct. 1115, 30 L. Ed. 1118; *Whitney* v. *Robertson*, 1888, 124 U. S. 190, 8

S. Ct. 456, 31 L. Ed. 386; and *Kelly* v. *Hedden*, 1888, 124 U.S. 196, 8 S. Ct. 459, 31 L. Ed. 389. The compelling logic of these cases is persuasive if not controlling in this regard, and we adopt it as controlling here.

Plaintiffs in *Bartram* were importers of sugar from a Danish possession. They sought a refund of duties paid on the sugar under protest because of a favored nation clause in a treaty between this country and Denmark. This country entered into a treaty with the King of the Hawaiian Islands after the effective date of the treaty with Denmark whereunder the United States agreed to admit, duty free, certain products of the Hawaiian Islands as an equivalent for an agreement by the King to admit certain products, duty free, from the United States into the Hawaiian Islands and for the concession by the King that during the term of the treaty he would not lease or otherwise dispose of any port or other territories in his domain or grant any special privileges thereto to any other government, or make any treaty by which any other nation would obtain the same privileges relative to duties thereby secured to the United States. The court stated that the favored nation clause in the treaty with Denmark did not cover concessions like those made to the Hawaiian Islands for valuable consideration. *Whitney* v. *Robertson* and *Kelly* v. *Hedden* involved the same question as it related to duty on sugar from the Dominican Republic and a treaty with that country. The court reiterated that the favored nation clause was not intended to interfere with special arrangements upon sufficient consideration with other countries.

These well reasoned authorities, involving as they do private rights based on favored nation clauses, are analogous to the instant situation. Considered together, they teach that there may be exceptions to such clauses where based on valuable considerations. Such consideration was present here. Such is the case here. The five airlines with the original contracts joined with appellant to establish

and sustain the airport in its infancy. By hindsight it can be said that they received a bargain, but the facts nevertheless show ample consideration. The contracts subsist and so long as they do, appellees cannot complain.

Having taken this view of the case, we do not reach the question of the use of a sliding or graduated scale of landing fees which appellees urge as being unjustifiable, nor the remaining defenses asserted by appellant.

Judgments should have been entered in the District Court for appellant. We REVERSE and REMAND so that this may be done.

A true copy. Test: Edward W. Wadsworth, Clerk, U. S. Court of Appeals, Fifth Circuit.

By CLARA R. JAMES, *Deputy*.

September 27, 1962
New Orleans, Louisiana

APPENDIX B

Judgments entered by United States Court of Appeals, Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19476

D. C. Docket Nos. 8990 and 9820-M-Civil

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY,
Appellant-Appellee,

v.

AEROVIAS INTERAMERICANA DE PANAMA, S. A., et al.
Appellees-Appellant
(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida

Before Tuttle, Chief Judge, Bell, Circuit Judge, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment for appellant, Board of County Commissioners of Dade County, Florida;

It is further ordered and adjudged that the appellees, Aerovias Interamericanas de Panama, S.A., and others, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 31, 1962

Issued:

JUDGMENT ENTERED AUGUST 31, 1962

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,632

D. C. Docket No. 10,428-M-Civil

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY,
Appellant-Appellee,

v.

LINEAS AEREAS DE NICARAGUA, S.A., *Appelle-Appellant,*
(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida

Before Tuttle, Chief Budge, Bell, Circuit Judge, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment for appellant, Board of County Commissioners of Dade County, Florida;

It is further ordered and adjudged that the appellee, Lineas Aereas de Nicaragua, S.A., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 31, 1962

Issued:

JUDGMENT ENTERED—AUGUST 31, 1962

APPENDIX C

Excerpts from certain original exhibits certified as part of the record but not heretofore printed.

1. Excerpts from Stipulated Exhibit 1[1]

Preliminary Pre-Trial Stipulation

* * * * * * * * * * *

Evidence

6. It is stipuated that Miami International Airport is the second largest airport in the United States in terms of international traffic. It ranks sixth in the United States in terms of domestic passenger traffic, and thirteenth in terms of domestic cargo traffic. Domestic airline service at Miami International Airport affords the shortest connection time intervals for international-domestic passengers and domestic-international passengers of any other airport in the Southeast United States. Similarly, it affords the best connections in the Southeast United States for both rail and air connections of cargo in international-domestic and domestic-international movements. Of all airports in the South, it is the closest in mileage to most Latin American countries. The Plaintiffs could efficiently and economically serve Miami only through the Miami International Airport.

7. Dade County, Florida, through the Board of County Commissioners, acting as the Dade County Port Authority, operates the Miami International Airport in a proprietary capacity.

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[1] Other portions of Stipulated Exhibit 1 are shown at pages of the Record. (R. 629-631)

2. Excerpts from Pan American lease agreement, dated December 11, 1945, effective January 1, 1946, Stipulated Exhibit 2 at pages 93-94.

Article XXVI

Leases with Other Air Transportation Companies

While the provisions of this instrument are in no respect dependent upon effecting lease agreements with other air transportation companies, nevertheless it is understood that the Authority shall have the right and probable will execute lease agreements forthwith with such other companies, and it is further understood that the Authority reserves the right to execute at any time hereafter lease agreements with others and to construct hangars and other buildings for them and to grant to them the right to use the landing field and all public parts of the Airport in common with the Lessee herein and all others rightfully using the airport.

The Authority covenants and agrees that if it enters into any contract, agreement or lease with any other air transportation operator or airline with respect to the Airport containing more favorable terms than this agreement, or if the Authority grants to any other air transport operator or airline, facilities, licenses or privileges with respect to the Airport which are more favorable than those accorded to Lessee, then the same terms, facilities, licenses and privileges upon the same terms and conditions will automatically and concurrently be made available to Lessee.

3. Excerpts from Plaintiffs' Exhibits 3 and 4

Request for Admission of Facts Under Rule 36— Plaintiff's Exhibit 3

Plaintiffs hereby request the defendant within ten (10) days after service of this request to make the following admissions for purposes of this action only and subject

to all pertinent objections to admissibility which may be interposed at the trial.

That each of the following statements is true:

. . . . . .

22. Braniff International Airways, Inc. (Braniff) in 1955, pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board began scheduled international air services between Miami, Florida and various Latin American countries through the use of the Miami International Airport.

23. Reports of Braniff, Pan American and National to the Civil Aeronautics Board and published traffic reports of the Immigration Service for the 12 months ended June 30, 1959, indicating the international passenger departures from Miami to Latin America, show that the passenger traffic was carried as follows:

Pan American	64.1% of all passengers
National	3.4% of all passengers
Braniff	2.0% of all passengers
All Foreign Carriers Combined	30.5% of all passengers
	100.0%

. . . . . .

Answers to Request for Admission of Facts Under Rule 36—Plaintiffs' Exhibit 4

. . . . . .

22. Admitted
23. Admitted

. . . . . .

4. Excerpts from Stipulated Exhibit 12-B

[The Fiscal Year]
1958/1959

Name of Airline [U.S.]	No. of Landings [International]
1. P.A.A.	8,196
2. N.A.L.	907
3. Braniff	308

5. Letter of General Counsel, Civil Aeronautics Board—Plaintiffs Exhibit 13

Civil Aeronautics Board—Plaintiff's Exhibit 13

CIVIL AERONAUTICS BOARD
Washington 25, D. C.

November 29, 1960

Philip Schleit, Esq.
Attorney at Law
1757 K Street, N.W.
Washington 6, D. C.

Re: Aerovias, et al. v. Bd. of Comm.
No. 8990-M; Cuba Aeropostal, S.A.
v. Bd. of Comm. No. 9820-M,
U.S. Dist. Ct. So. Dist. Fla.
(Miami Division)

Dear Sir:

This will acknowledge receipt of your letter of November 28, 1960, with respect to the above-captioned litigation, and requesting the opinion of the General Counsel of the Board with respect to certain questions concerning the operating rights and regulations applicable to international airlines. It is my understanding that it is proposed to submit these answers as part of the record in the litigation.

In the interest of simplicity, I am listing the questions as stated in your letter, together with the answer to each such question.

I. Do the foreign air carrier permits of each of the 13 foreign airlines shown in Annex A attached hereto authorize such foreign airline to:

a) Engage in scheduled foreign air transportation over the route or routes specified in the permit, also to engage in non-scheduled foreign air transportation over said route or routes?

Answer: Yes.

b) Engage in "air services" over said routes within the meaning of the various bilateral air transport services agreements?

Answer: Yes.

c) Engage in "scheduled international air services" over said routes within the meaning of articles 6 and 15 of the Convention on International Civil Aviation, known as the Chicago Convention (61 Stat. 1180)?

Answer: Yes.

d) Engage in "scheduled international air services" between the United States terminal point and a point or points, not named in the foreign air carrier permit, beyond the foreign carrier's homeland so long as such flights serve the foreign carrier's homeland in the case of all foreign airlines listed in Annex A (except TAN since September 18, 1960, in whose permit certain beyond services are prohibited)?

Answer: Yes.

II. In view of the fact that the C.A.B. and its staff have an important part in the development of bilateral air transport agreements, and that the C.A.B. has regulatory functions over both foreign and U. S. flag air carriers operating under these bilateral agreements, there are the following questions:

a) In the opinion of the General Counsel of the Board, is the Convention of International Civil Aviation (Commonly known as the Chicago Convention, 61 Stat. 1180) a treaty in full force and effect?

Answer: Yes.

b) In the opinion of the General Counsel of the Board, have all of the foreign airlines, listed in Annex A attached hereto (with the exception of the Guatemalan, Nicaraguan and Honduran airlines) been accorded by the United States the airline operating rights into the United States provided

for in the Air Transport Services Agreements with their respective countries?

Answer: In accordance with the provisions of Section 1102 of the Civil Aeronautics Act of 1938, as amended, and Section 1102 of the Federal Aviation Act of 1958, the airline operating rights granted to the foreign airlines listed in Annex A (with the exception of the Guatemalan, Nicaraguan and Honduran airlines) have been granted consistently with the provisions of the Air Transport Services Agreements with their respective countries.

(c) In the opinion of the General Counsel of the Board, have three Central American Airlines (of Guatemala, Nicaragua and Honduras), wherein no bilateral air transport services agreements exist been accorded by the United States airline operating rights into the United States generally reciprocal to the airline operating rights accorded United States flag airlines in the respective foreign countries?

Answer: Upon the basis of the opinions and orders of the Board which issued foreign air carrier permits to the Guatemalan, Nicaraguan and Honduran airlines listed in Annex A, it is my opinion that the airline operating rights of those airlines have been granted by the United States for the purpose of granting rights reciprocal to those granted to United States carriers by the country of which the airline is a national.

III. As to Compania Cubana de Aviacion, S.A. ("Cubana"), do the records of the Board indicate that Cubana was controlled in whole or in part by Pan American World Airways, Inc., until about 1955?

Answer: In Havana-New York Air Carrier Permit Case, 14 C.A.B. 399 (1951), the Board found that Cubana was a wholly owned subsidiary of Pan American Airways from March, 1932, until November, 1945, at which time 48 percent of the stock was allocated for sale to Cuban nationals.

Pan American's holdings had been reduced to 48 percent by 1947, and to 42 percent at the time of the oral argument in the aforesaid proceeding. The Board's opinion in *Compania Cubana de Aviacion, Air Carrier Permit*, 20 C.A.B. 482 (1955), states that sale of the remaining shares of Pan American was completed in 1954 and that liquidation of that debt owed by Cubana to Pan American would be completed on March 10, 1955.

IV. Has it been generally customary for the past several years for international airlines carrying passengers to serve complimentary meals aloft to their passengers?

Answer: The international airlines who are members of the International Air Transport Association (approximately seventy in number) have entered into agreements, copies of which are on file with the Civil Aeronautics Board, which permit such airlines to serve complimentary meals aloft to their passengers in accordance with the requirements and limitations prescribed by such agreements. Most of the major international airlines of the world are members of the Association. To the best of my knowledge the Board has no official record of agreements or practices of international airlines who are not members of the Association.

Yours very truly,
FRANKLIN M. STONE
General Counsel

by JOHN H. WANNER
Deputy General Counsel

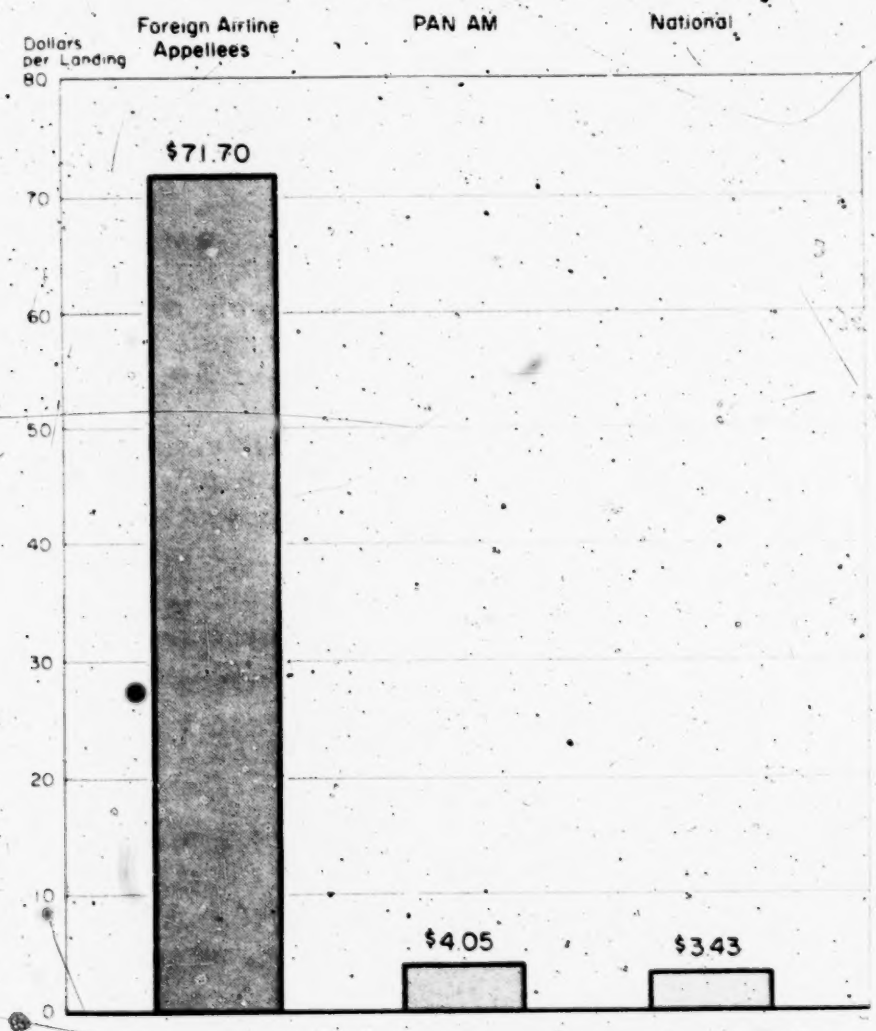
In the
United States Court of Appeals
For the Fifth Circuit

Case Nos 19,476
and 19,632
Page 3 of 4

EXHIBITS FOR ORAL ARGUMENT

Airport Charges for One Year Ending September 30, 1959

Comparison of Average Charge per Landing for Nine Appellees, then operating, and Pan Am and National



Source Stipulated exhibit 9 and 12; gas & oil concession charges, Plaintiffs Exhibits 15-17 (attached exhibits) Amounts include passenger, cargo, landing charges, and gas & oil concession charges Do not include catering charges Nine appellees paid total of $187,701.25 for 2,618 landings PAN AM paid $33,153.00 for 8,196 landings, and National paid $33,198.00 for 10,227 landings One appellee did not begin service until 1960 and one appellee has suspended

APPENDIX D

Part of Proceedings in Court Below

District Court Order, Exhibit I attached to Petitioners' Motion in the Court of Appeals, which Motion was entitled "Motion By Appellees To Include Certain Recent Dade County Port Authority Resolutions, Contracts and Facts As Part of The Record On Appeal."

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 8990-M-Civil-EC

AEROVIAS INTERAMERICANAS DE PANAMA, S.A.; AEROLINEAS PERUANAS, S.A.; COMPANIA CUBANA DE AVIACION, S.A.; COMPANIA ECUATORIANA DE AVIACION, S.A.; EMPRESA GUATEMALTECA DE AVIACION; EMPRESA DE TRANSPORTES AEROVIAS BRASIL, S.A.; EXPRESSO AEREO INTER-AMERICANO, S.A.; GUEST AEROVIAS MEXICO, S.A.; LINEAS AEREAS DE NICARAGUA, S.A.; LLOYD AEREO COLOMBIANO; RUTAS AEREAS NACIONALES, S.A.; AND TRANSPORTES AEREO NACIONALES, S.A.,

Plaintiffs

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, ACTING AS DADE COUNTY PORT AUTHORITY,

Defendant

No. 9820-M-Civil-EC

CUBA AEROPOSTAL, S.A.,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, ACTING AS DADE COUNTY PORT AUTHORITY,

Defendant

ORDER

THIS CAUSE came on before the Court upon Motion of the Plaintiffs-Appellees for the entry of an order designating certain resolutions and contracts of the defendant-appellant Port Authority occurring since decision herein and Final Decree as part of the record on appeal, and to modify the Stay Order; and after hearing argument of counsel for both parties and upon due deliberation, it appears to the Court:

Ordered that the motion to modify the Stay Order is referred to Judge Lieb.

That such documents would show the removal of all cargo terminal charges on all airlines since October 1, 1961, and new reduced rate airport charges for Braniff Airways, Inc., and certain other non-litigant foreign airlines as of January 1, 1962, granting also Braniff and the others equal future relief to that finally achieved by plaintiffs-appellees in this cause; that such matters would be relevant to the appeal only with respect to certain injunctive features; and they affect only the trial court's opinion under point 4 at page 244 of 197 F. Supp. 230 (1961), which contention of the defendant-appeallant upon stipulation of all counsel in open court can not now be urged by defendant-appellant before the United States Circuit Court of Appeals; it is

ORDERED, that the motion be and it hereby is denied.

DONE AND ORDERED at Miami, Florida, this 20th day of February, 1962.

/s/ EMETT C. CHOATE
United Staes District Judge

APPENDIX E

Portions of Legislative History of Convention on International Civil Aviation. 61 Stat. 1180
State Department Memorandum for United States Delegates at Convention

Summary of Objectives Favored by the United States of America with Respect to Post-War Civil Air Transport

Confidential: For Information of the United States Delegates

II (2) Use of airports and Facilities on a Non-discriminatory basis

Policy Recommended:

That each country agree and take necessary implementary action:

(1) That the use of public airports, accessory facilities, and technical assistance such as navigational aids, weather reporting and telecommunications be made available to civil aircraft of the other on a basis of national and most-favored-nation treatment;

(2) That commercial aircraft of the other which have been granted rights of commercial entry or transit rights may have equality of opportunity to obtain or provide necessary facilities for fueling, repair or maintenance; and

(3) That the appropriate aeronautical authorities of each Government establish procedures for enforcing compliance with these provisions.

Background Material:

General. It is a well-established principle in international practice that the granting of commercial rights of entry (See Item I, (2)) requires the according to the aircraft transport service of another country as favorable

treatment with respect to use of public airport facilities as are accorded to aircraft of nationals of the country granting the operating rights. It is also considered that treatment on this basis is a necessary adjunct to the granting of the right of transit and technical stop. (See Item I (1).)

Situations have arisen where an air transport service of one country which has been granted commercial operating right into another country, has been estopped from effectively operating as a result of the efforts of national competitors to block access to existing fueling, maintenance or repair facilities and to prevent the providing of such facilities by the new carrier. The provisons in clauses (2) and (3) have been inserted with a view to assuring that the Government granting commercial operating rights to a foreign carrier will enforce equality of opportunity to obtain or provide accessory facilities vital to effective operation.

British Viewpoint

The British Draft Agenda does not include an identical item. However, attention is invited to Item 2 (9). The British position is probably indicated by the provisions in the international agreement cited below.

U. S. Viewpoint

It is believed that the treatment recommended in the policy declaration should be granted as a matter of course under international practice in connection with the granting of operating rights to American aircraft.

U. S.-British Agreements

The British and Canadian Governments are parties to the Paris Convention of 1919 which includes the following article:

"Art. 24.—Every aerodrome in a contracting State, which upon payment of charges is open to public use

by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

"In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft."

The Air Navigation Arrangement between the United States and Great Britain, effective May 5, 1935, includes this British commitment:

"7. Aerodromes open to public air traffic in the territories to which this Note applies will, so far as they are under the control of His Majesty's Government in the United Kingdom, be open to United States aircraft, which (subject to the same proviso) will also be entitled to the assistance of the meteorological, wireless, lighting and day and night signalling services at such aerodromes. Subject again to the same proviso, the scale of charges at such aerodromes for landing and accommodation will be the same for United States as for British aircraft."

This applies only to the following territories:

United States territories:

Continental United States

Alaska

American Samoa (comprising the Island of Tutuila, the Manua Islands, and all other Islands of the Samoan group east of Longitude 171° west of Greenwich, together with Swains Island)

Puerto Rico (including Vieques, Culebra, Mona and Desecheo)

Virgin Islands of the United States (comprising St. Thomas, St. John, St. Croix and dependent islets)

British territories:

United Kingdom of Great Britain and Northern Ireland
Newfoundland including Labrador
Bahamas
Barbados
Bermuda
British Guiana
British Honduras
Jamaica (including Turks and Caicos Islands and the Cayman Islands)
Leeward Islands and their dependencies including:
Antigua
Dominica
Montserrat
St. Christopher and Nevis
Virgin Islands
Trinidad and Tobago
Windward Islands and their dependencies including:
Grenada
St. Vincent
St. Lucia

STATEMENT OF MR. W. L. CLAYTON, ASSISTANT SECRETARY OF STATE, AT THE SENATE FOREIGN RELATIONS COMMITTEE HEARING, MONDAY, MARCH 19, 1945

At the outset, I would like to emphasize that the International Civil Aviation Convention which has been submitted to the Senate by the President is a document independent of all other agreements drawn up at the Chicago Air Conference and should be passed upon on its own merits.

The International Civil Aviation Convention sets forth modernized basic regulations governing international civil aviation. It covers the air transport, air navigation and technical phases of aviation, and establishes a basis for

common air practice throughout the world. It sets up an International Civil Aviation Organization on a truly world wide basis. This body consists of an assembly representing all States parties to the Convention, as well as a 21-member Council, which will have advisory and technical functions, but which is not empowered to regulate the economic aspects of international air transportation.

The fundamental improvement which the Chicago Aviation Convention makes is the replacement of the international aviation convention adopted at Paris in 1919 and the international aviation convention adopted at Habana in 1928 by a single modernized convention. This makes it possible to bring about the adoption and application of international rules and standards on a more universal basis than has heretofore been accomplished. In view of the increasing speed of aircraft and their ability to fly over the territories of many countries in a single flight, international air navigation can be greatly impeded by divergencies between the rules and standards of flight arising out of different international convention. Furthermore, the experience of the last few years has emphasized the importance of bringing air navigation regulations up to date.

In connection with the foregoing, particular attention is invited to the situation that has existed in the Western Hemisphere. International aviation in Canada and in European possessions of the Western Hemisphere was governed by the principles of the Paris Convention. The United States, Mexico, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Dominican Republic, Haiti, Ecuador, and Chile are parties to the Habana Convention, but are not parties to the Paris Convention. Peru, Paraguay, Uruguay and Argentina are not parties to the Habana Convention, but are parties to the Paris Convention. Since in some of the countries of the Western Hemisphere there have been no rules governing international air navigation

other than those included in national laws, while in other countries of this Hemisphere either the Paris or Habana Convention was applicable, there were marked divergencies in the international regulation of aviation. While these conditions were perhaps endurable in the pioneering days of aviation, before the war, they would be unendurable with the vastly increased traffic anticipated in the post-war era.

The delegates to the Chicago Aviation Conference were in a position to profit by the experience gained in the practical application of the Paris and Habana Conventions, and retained in the Chicago Convention a number of the basic principles of the Paris and Habana Conventions which, in their practical application, had satisfactorily met the needs of international air navigation. At this stage, I should like to give a general outline of outstanding differences between the Chicago Convention and the existing multilateral aviation conventions.

The provisions of the Paris and Habana Conventions setting forth the conditions under which commercial and non-commercial aircraft of a contracting State would be allowed to operate in territory of other contracting States were not at all clear. Although the Paris Convention provided that the operation of scheduled air services of any contracting State over territory of another contracting State would be subject to the latter's prior consent, the provisions of the Convention relied upon to establish a general right of entry for private or tourist flights or for occasional charter flights were rather ambiguous since the provision of the Convention mainly relied upon to establish this general right of entry was the one granting the right of innocent passage, a term which many have confused with the establishment of a general right of transit for commercial air lines. Moreover, a provision in another part of the Paris Convention under which each contracting State granted to aircraft of other contracting States the

right to fly in transit through its territory was also relied upon to establish the general right of transit for non-scheduled services.

The Habana Convention grants the right of innocent passage in one article and states in another article that the aircraft of a contracting State engaged in international air commerce shall be allowed to discharge passengers and cargo of foreign origin in another contacting State and take on passengers and cargo in such other State for a foreign destination, but the Convention does not specifically state that the operation of scheduled air lines of one contracting State in territory of another shall be subject to the latter's prior authorization. In practice, however, the Habana Convention has been interpreted as requiring such prior authorization.

Having in mind these ambiguities of the Paris and Habana Conventions, the delegates at the Chicago Aviation Conference clarified the situation by definitely providing in Article 5 that aircraft of a contracting State not engaged in scheduled international air services shall have the definite right of entry into or transit through the territory of other contracting States subject to certain reasonable limitations and conditions which are fully explained in Article 5. As to the entry of international scheduled lines the Chicago Convention leaves no doubt as to what the delegates to the Chicago Conference had in mind, since Article 6 is very specific and definitely provides that no scheduled international air service may be operated over or into the territory of a contracting State except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Part I of the Chicago Convention contains general principles pertaining to air navigation. A number of these are basically the same as corresponding provisions found in the Paris and Habana Conventions, but they have been

modernized in the light of the practical operating experience of the last few years.

Part II of the Chicago Convention provides for the establishment of the International Civil Aviation Organization. Part II contains a number of provisions not found in the Paris Convention of 1919, since that part defines the duties of a Council and an Assembly which are to constitute the International Civil Aviation Organization, whereas the Paris Convention established a single body known as the International Commission for Air Navigation which had important duties in the matter of developing international regulations on various technical subjects. The advantage in having the International Civil Aviation Organization under the Chicago Convention comprised of both a Council and an Assembly is that representation in the Assembly of all the contracting States is provided for, while the Council, a smaller body composed of States elected on the basis of their importance in international air transport or contribution of air navigation facilities, or elected because of geographical position, is in a better position to act expeditiously.

The International Commission for Air Navigation adopted technical regulations which were embodied in the annexes to the Paris Convention, and it was provided in that Convention that these regulations would become effective upon their notification to the contracting States. The Chicago Convention deals with the matter in a somewhat different way since under this Convention the Council will adopt international standards and recommended practices, which will come into force as such unless disapproved by a majority of the contracting States. While it is generally agreed that the various countries should adopt and apply these international standards in their national regulations to the greatest possible extent, there is the possibility under the Chicago Convention of some departure from the international standards if a particular gov-

ernment feels that it has serious reasons for such departure.

The Convention further provides that the Council shall establish an air navigation commission composed of qualified and experienced persons charged with the duty of making studies of technical aviation operational matters and that the findings of this commission are to be submitted to the Council for adoption. Among the matters referred to here would be such questions as radio communication procedures, air navigation aids, rules of the air, air traffic control, airworthiness of aircraft and aeronautical meteorology. The great advantage of such a centralized study of these questions on a world-wide basis will be apparent. The fast increasing number, size and speed of aircraft using the air space makes it more and more necessary to simplify, improve and standardize air navigation procedures.

The Convention permits a country which finds it impossible or inadvisable to conform to the practices recommended by the Council to deviate from those practices, provided the Council is given seasonable notice of such deviations so that other countries may be informed thereof.

A fundamental weakness in the Habana Convention is that it provided for no international aeronautical body to develop international standards in the technical field of aviation.

Part III of the Chicago Convention deals with international air transport. This part contains important provisions conferring upon the Council the power to assist the contracting States in the matter of making available in the territory of a contracting State adequate airports and facilities for the safe, regular, efficient and economical operation of international air services of the other contracting States.

The Convention provides that all agreements relating to international air transportation shall be filed with the Council and that full publicity be given thereto. We believe that this is an important provision in that it ends the era of secret diplomacy in international air transport.

This Convention, Gentlemen, is literally a "constitution" for the postwar air world, and a framework under which international aviation can thrive and grow strong. It establishes common practices throughout the world so that any aircraft can fly from any airport to any other airport on any continent, following rules, regulations and practices which are universal in their application. It provides the necessary machinery in anticipation of a vastly intensified tempo of postwar world aviation activity.

DEPARTMENT OF STATE
WASHINGTON

In reply refer to L/T

November 29, 1962

Dear Mr. Schleit:

In your letter of November 6, 1962 you request an opinion of the Department of State whether the Convention on International Civil Aviation, (61 Stat. 1180), particularly Article 15 thereof, is considered to be self-executing, or whether the Department considers that implementation by the Executive or by the Legislative branch of the Government was necessary to make Article 15 fully effective.

You state that this request is made for the purpose of clarifying certain confusion which you consider has arisen in the United States courts on the foregoing point and refer to *Arcovias et al* v. *Board of County Commissioners*, 197 F. 2d 230 (District Court Opinion), and a Court of Appeals opinion in the same case of August 31, 1962.

A survey of the records of the Department of State regarding this Convention indicates that the question whether Article 15 of the Convention is self-executing has not been raised heretofore. The Department has, from all indications in its records, proceeded on the basis that since the entry into force of the Convention on April 4, 1947 Article 15 has been in full force and operative without the enactment of any additional legislation or implementation by the Executive.

In accordance with its policy of not issuing legal opinions at the request of a private party with respect to a matter which is *sub judice* the Department regrets that it is unable to comply with your request. If requested by a court which is seized of the issue, however, the Department would be glad to express its opinion as to the present effect of Article 15 of the Convention.

Sincerely yours,

Richard D. Kearney
Deputy Legal Adviser

Mr. Philip Schleit,
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